142-339

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1558~~. 983

THE PACIFIC EXPRESS COMPANY, APPELLANT,

vs.

JAMES M. SEIBERT, STATE AUDITOR OF THE STATE OF MISSOURI, AND JOHN M. WOOD, ATTORNEY GENERAL OF THE STATE OF MISSOURI.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 17, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1558.

THE PACIFIC EXPRESS COMPANY, APPELLANT,

vs.

JAMES M. SEIBERT, STATE AUDITOR OF THE STATE OF MISSOURI, AND JOHN M. WOOD, ATTORNEY GENERAL OF THE STATE OF MISSOURI.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Assignment of errors	1	1
Caption	3	1
Bill of complaint	4	2
Exhibit A—Act to define express companies and to prescribe the mode of taxing the same, &c., approved May 16, 1889	13	7
Subpœna	16	8
Marshal's return	17	9
Notice of motion for injunction	17	9
Order for temporary injunction	18	10
Bond for injunction	19	10
Stipulation as to time to plead, &c.	20	11
Demurrer to bill	21	11
Præcipe to set demurrer for argument	22	12
Final decree and allowance of appeal	23	13
Bond on appeal	24	13
Opinion	26	14
Clerk's certificate	43	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 24, 1891.

1 In the Circuit Court of the United States for the Western District of Missouri, Western Division.

THE PACIFIC EXPRESS COMPANY, Complainant,
vs.
JAMES M. SEIBERT, State Auditor, and JOHN M. WOOD, Attorney Gen'l.
} Assignment of Errors.

The Pacific Express Company, complainant in the above-entitled cause, now assigns the following errors in the decree of the circuit court, viz:

I. The circuit court erred in sustaining the demurrer to the bill and in dismissing the bill for want of equity.

II. There is manifest error in the decree of the circuit court, in this: The act of the Legislature of the State of Missouri entitled "An act to define express companies and to prescribe the mode of taxing the same and to fix the rate of taxation thereon," approved May 16th, 1889, is an interference with and regulation of interstate commerce and, so far, in violation of the Constitution of the United States and void.

III. There is further manifest error in the decree of the circuit court, in this:

The act of the Legislature of the State of Missouri entitled "An act to define express companies and to prescribe the mode of taxing the same and to fix the rate of taxation thereon," approved May 16th, 1889, denies to the complainant the equal protection of the laws of the State of Missouri by creating a discrimination in favor of persons, associations, and corporations engaged in carrying by express who own or who do not hire transportation facilities from

2 any railroad or steamboat company and by imposing its burden of taxation only upon such persons, associations, and corporations as carry by express "on contract" with railroad or steamboat companies, in violation of the 14th amendment to the Constitution of the United States, notwithstanding which said circuit court held said act to be a valid law.

IV. There is further manifest error in the decree of the circuit court, in this:

The act of the Legislature of the State of Missouri entitled "An act to define express companies and to prescribe the mode of taxing the same and to fix the rate of taxation thereon," approved May 16th, 1889, imposes upon the complainant unequal taxation by imposing said tax upon all persons, associations, and corporations who carry by express "on contract" with any railroad or steamboat company and exempting such persons, associations, and corporations as carry by express over their own lines of transportation and who do not procure their transportation facilities "on contract" with any railroad or steamboat company, in violation of section three (3), article ten (10), of the constitution of the State of Missouri, providing that all taxation "shall be uniform upon the same class of

subjects within the territorial limits levying the tax, and all taxes shall be levied and collected by general laws," notwithstanding which the said circuit court held the said act a valid law.

Wherefore, because of the said errors, greatly prejudicial to complainant, complainant prays that the decree of the circuit court may be reversed.

W. W. MORSMAN.
Solicitor for Complainant.

3 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on the seventeenth day of June, A. D. 1890, a bill of complaint was filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri, wherein The Pacific Express Company is complainant and J. M. Seibert *et al.* are defendants.

Said bill of complaint is in words and figures as follows:

4 In the Circuit Court of the United States for the Western District of Missouri, Western Division. September Term, 1890.

THE PACIFIC EXPRESS COMPANY
vs.
J. M. SEIBERT, State Auditor, and JOHN M. WOOD, Attorney General. } Bill in Equity.

To the judges of the above-named court:

Your orator, The Pacific Express Company, respectfully represents—

1st. That it is a corporation organized under and created by the laws of the State of Nebraska, and for the purposes of the jurisdiction of this court a citizen of said State of Nebraska; and the defendant J. M. Seibert is the State auditor of the State of Missouri, and the defendant John M. Wood is the attorney general of the State of Missouri and an inhabitant of the above-named district, residing at the city of Jefferson, in the said last-named State, and that the matter in dispute in this suit exceeds the sum of two thousand dollars ($2,000), exclusive of interest and costs.

2nd. That on the 16th day of May, 1889, your orator was and all of the time since has been and now is engaged in the business of conveying money, packages, gold, silver, plate, articles, goods, and merchandise to, from, and through the State of Missouri and various parts of said State by express, and that in the prosecution of its said business your orator did not at the times aforesaid have or provide its own transportation, but carried on its said business and conveyed the descriptions of property aforesaid within the said State of Missouri over the railroad of and on contract with the Mis-
5 souri Pacific Railroad Company and various other railroad companies whose lines of road are and have been operated within said State.

3rd. That in the prosecution of its said business your orator did at the time and during the period aforesaid and now does receive property of the descriptions aforesaid at numerous points or towns within the States of Nebraska, Kansas, Texas, Colorado, and many other States of the United States, and convey the same for its patrons, for hire, from such points to the various points or towns within the said State of Missouri; and your orator did and now does receive property of the descriptions aforesaid at various points or towns within the State of Missouri, and convey the same, for hire, for its patrons to numerous points or towns within the States of Nebraska, Kansas, Texas, Colorado, and many other States of the United States; and your orator did and does now receive property of the descriptions aforesaid at various points or towns within the said State of Missouri, and convey the same, for hire, for its patrons to numerous other points or towns within the said State of Missouri, delivering said property at destination to the person or persons there to whom the same is consigned.

4th. That at the time and during the period aforesaid there were and there are now other persons, copartnerships, associations, and corporations residing and doing business within the State of Missouri who were engaged in conveying to, from, and through the said State and various parts of the same goods and property of the descriptions aforesaid, for hire, by freight and by express, but not on contract with any railroad or steamboat company, or the managers, lessees, agents, or receiver thereof, within said State, such persons, copartnerships, associations, and corporations being either
6 provided with their own transportation facilities or procuring the same by hire from other persons not a railroad or steamboat company or the manager, lessees, agent, or receiver thereof.

5th. That on said first-named date the General Assembly of the State of Missouri passed an act entitled "An act to define express companies and to prescribe the mode of taxing the same and to fix the rate of taxation thereon," and which act took effect on the 19th day of May, 1889, whereby it was enacted that—

"Any person, persons, joint-stock association, company, or corporation conveying to, from, or through the State of Missouri or any part thereof money, packages, gold, silver, plate, articles, goods, merchandise, or effects of any kind, by express, on contract with any railroad or steamboat company, or the managers, lessees, agents, or receiver thereof, but not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in said State, should be deemed an express company."

And by another section of the same act it was also enacted that—

"Every such express company should make an annual report, under oath, to the State auditor of said State, showing the entire receipts for business done within said State of each agent of such express company doing business within the State for the year next preceding the first day of April in each year, including therein such company's proportion of gross receipts for business done by said company with other companies.

And by said section it was further provided that—

The report of such company should contain an abstract of the amount received in each county and the total amount received for all of the counties of the State, and that, in case of failure
7 or refusal of such express company to make such report on or before the first day of May, it should then be the duty of each local agent within the State to make such report of the gross receipts of his agency on or before the first day of June."

And by the said act it was further provided that—

"When such statement should be made, and after deducting from the gross receipts shown thereby the amounts actually paid by such express company to the railroads or steamboats within the said State for the transportation of freight for such express company within said State, such express company should pay into the treasury of the State the sum of two dollars on each one hundred dollars of such receipts."

And by the said act it was further provided that—

"Nothing contained in the said act shall release any such express company from the assessment and taxation of its tangible property in the manner that other tangible property is assessed and taxed in said State."

And by said act it is further provided that—

"If any such express company shall fail for more than thirty days after the first day of June in each year to make to the State auditor the reports aforesaid and to pay the required tax thereon, then such express company shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered in an action in the name of the State of Missouri on the relation of the State auditor, and that such action shall be prosecuted by the attorney general of the State; and that such express company shall be prohibited from carrying on said business in the State of Missouri until such payment is made."

8 A copy of the act of the General Assembly of the State of Missouri above referred to is hereunto annexed and made part hereof for convenient reference, and marked "A."

6th. Your orator avers that if the act aforesaid of the General Assembly of the State of Missouri is a valid law your orator would be required to pay into the State treasury for the year ending April first, 1890, the sum of (estimated) twelve thousand and forty-four $\frac{64}{100}$ dollars, and if the said act be a valid law only in respect to the gross receipts upon such business as your orator has done as aforesaid between points wholly within the State of Missouri and void as to gross receipts upon such business as your orator has itself or in connection with other carriers done between points within the State of Missouri and points in other States, then your orator would be required to pay the sum of three thousand one hundred forty-three $\frac{84}{100}$ dollars for the period aforesaid.

Your orator avers that it does not seek to escape any just burden of taxation legally imposed upon it, and if it shall be adjudged that said act is a valid law, or valid to the extent of gross receipts upon the transportation business done by your orator originating and term-

inating wholly within the State of Missouri, your orator is ready and willing and will promptly pay the sum imposed upon it as required by the terms of said act.

7th. But your orator avers that the said act of the General Assembly of the State of Missouri is not a valid law and is not binding upon your orator; that a large proportion of the gross receipts of your orator upon business done within the State of Missouri is for transportation charges upon property of the description contained in said act, being carried by your orator or by your orator and its connecting lines from points or towns outside of the State of Missouri to points or towns within said State of Missouri and from points or towns within said State of Missouri to points or towns situated in other States; that such transportation is commerce between different States and the tax imposed by said act is a tax upon such commerce, and so far, your orator avers, the said act is in violation of that provision of the Constitution of the United States which vests in the Congress of the United States the exclusive right to regulate commerce among the several States.

8th. Your orator further avers that neither the said tax of two per cent. nor any other equivalent tax is imposed by the said act or by any law of the State of Missouri upon other common carriers of goods or upon persons, associations, or corporations engaged or who may engage in conveying property and goods of the description contained in said act by express, or upon the business or gross receipts of such common carriers, persons, associations, and corporations who do not hire transportation by "contract with any railroad or steamboat company or the managers, lessees, agents, or receivers thereof;" and your orator further avers that by the laws of the State of Missouri it was, at the date of the passage of the act hereinbefore mentioned, and has ever since been, provided in respect to all other ad valorem and per centum taxes that the assessments of persons, property, and business for the purpose of such taxation should be equalized between the persons, associations, and corporations responsible for the payment of such tax by a county board of equalisation, with the right of appeal from the assessment to such board, and that such assessment should be equalized as between the several counties of the State by the State board of equalization, whereas by the act aforesaid no provision is made for the equalization of the tax therein provided for, either by the county boards of equalization or by such State board, nor any right of appeal, nor is any such equalization *of* right of appeal provided for by any other law of the State of Missouri. Your orator therefore avers that said act denies to it the equal protection of the laws of the State of Missouri, in violation of that provision of the fourteenth amendment to the Constitution of the United States which prohibits any State to deny to any person within its jurisdiction the equal protection of its laws, and said tax imposed by said act not being imposed upon all of the persons, associations, corporations, property, or business of the class to which it applies and to which your orator, its business, and its property belong, the tax so imposed is wanting in uniformity and in violation of section three (3) of article ten (10)

of the constitution of the State of Missouri, by which it is provided that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

9th. Your orator further avers that it is provided by section four (4) of article ten (10) of the constitution of the State of Missouri that "all property subject to taxation shall be taxed in proportion to its value," and by section eight (8) of the same article that "the State tax upon property shall not exceed twenty cents on the hundred dollars' valuation;" that the said tax not being based upon value nor levied by any rule of proportion nor subject to any limit other than the volume of business of the express companies subjected to it, the said act is in violation of the aforesaid provisions of the constitution of the State of Missouri.

11 10th. Your orator further avers that the defendants herein, notwithstanding the facts hereinbefore set forth, claim and give out that the said act of the State of Missouri is a valid law, and that your orator is under legal obligation and duty to make the annual report and pay the tax provided for in said act, and that they, the said defendants, being the officials charged by the terms of said act with the duty of enforcing its provisions are under an official duty and obligation to demand compliance by your orator with the provisions of said act, and to coerce such compliance by proceeding to enforce the penalties therein provided for; that unless restrained by the orders and process of this court from so doing the said defendants will proceed as if to enforce the same by instituting legal proceedings for the collection of the penalties therein prescribed, and to prohibit your orator from carrying on its business within the State of Missouri, whereby your orator will be subjected to and harrassed by a multiplicity of suits and suffer irreparable loss and injury for which it has no adequate remedy at law.

Wherefore your orator, to the end that it may be justly and equitably relieved, now prays the court to grant its process by subpœna directed to the same J. M. Seibert, State auditor of the State of Missouri, and the said John M. Wood, attorney general of the State of Missouri, the defendants hereinbefore named, commanding them and each of them to appear herein and answer your orator's said bill of complaint, but not under oath, an answer under oath being hereby expressly waived; and your orator further prays the said act of the General Assembly of the State of Missouri be adjudged and decreed to be unconstitutional and void, and that an injunction be granted to your orator restraining and enjoining the said defendants and each of them from in any manner pro-

12 ceeding to enforce the said act or any penalty therein provided for against your orator pending the trial of this cause and until the further order and decree of the court, and that said injunction be finally made and decreed to be perpetual, and for such other and further relief in this behalf as may be equitable and just.

THE PACIFIC EXPRESS COMPANY,
By W. W. MORSMAN, *Its Solicitor.*

W. W. MORSMAN, *Of Counsel*

STATE OF MISSOURI, } *sct:*
City of St. Louis, }

I, L. A. Fuller, being first duly sworn, on my oath do say I am superintendent of The Pacific Express Company, complainant in the foregoing bill of complaint, and that I am acquainted with the facts set forth in said bill, and that the same are true as I verily believe, so help me God.

L. A. FULLER.

Subscribed in my presence and sworn to before me by L. A. Fuller this 26th day of May, 1890.

[SEAL.] W. T. FRANKLIN,
Notary Public within and for the City of St. Louis, Mo.

My commission expires Dec. 10, 1893.

13 "A."

An act to define express companies and to prescribe the mode of taxing the same and to fix the rate of taxation thereon.

SECTION 1. Any person, persons, joint-stock association, company, or corporation incorporated under the laws of any State, Territory, or county conveying to, from, or through this State or any part thereof money, packages, gold, silver, plate, articles, goods, merchandise, or effects of any kind by express on contract with any railroad or steamboat company or the managers, lessees, agents, or receivers thereof (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this State) shall be deemed to be an express company.

SEC. 2. Every such express company shall annually, between the first day of April and the first day of May, make and deliver to the State auditor a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this State of each agent of such company doing business in this State for the year then next preceding the first day of April for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies: Provided, that the amount which any express company actually pays to the railroads or steamboats within this State for the transportation of their freight within this State may be deducted from the gross receipts of such company as above ascertained; and provided further, that said amount paid to the various railroad or steamboat companies for transportation shall be itemized, showing the amount paid to each railroad or steamboat
14 company; and provided further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or charged for the business done within this State for such preceding

year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county and the total amount received for all the counties. In case of the failure or refusal of such express company to make such statement before the first day of May it shall then be the duty of each local agent of such express company within this State annually, between the first day of May and the first day of June, to make out and forward to the State auditor a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of April. When such statement is made such express company shall at the time of making the same pay into the treasury of the State the sum of two dollars on each one hundred dollars of such receipts; and any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided and to pay the required tax thereon shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered in an action in the name of the State of Missouri on the relation of the State auditor in any court of competent jurisdiction, and the attorney general shall conduct such prosecution; and such company, corporation, or association so failing or refusing shall be prohibited from carrying on said business in this State until such payment is made.

15 SEC. 3. There being no law in this State by which such express companies are taxed creates an emergency within the meaning of the constitution; therefore this act shall take effect and be in force from and after its passage.

Approved May 16th, 1889.

16 Thereupon a subpœna in chancery was issued in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *sct:*
Western Division of the Western District of Missouri, }

The President of the United States of America to J. M. Seibert, State auditor, and John M. Wood, attorney general of the State of Missouri, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri on the first Monday of August next, at the city of Kansas, then and there to answer the bill of complaint of the Pacific Express Company, a citizen of the State of Nebraska, filed against you on the 17th day of June, A. D. 1890. Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 17th day of June, A. D. 1890.

Issued at office, in the city of Kansas, under the seal of said court, the day and year last aforesaid.

[SEAL.]

WARREN WATSON,
Clerk of said Circuit Court,
By A. UTTER, *D. C.*

MEM.—The defendants to enter appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

WARREN WARSON, *Clerk*,
By A. UTTER, *D. C.*

The marshal's return of service on said writ is in words and figures as follows, to wit:

17 UNITED STATES OF AMERICA, } *sct:*
Western Division of the Western District of Missouri, }

I do hereby certify that I executed this writ by delivering a copy thereof to J. M. Seibert, auditor of the State of Missouri, at his office, in Jefferson City, Mo., and another copy thereof to John M. Woods, attorney general of the State of Missouri, at his office, in Jefferson City, Mo., in the western district of Missouri, on the 18th day of June, 1890.

JOHN P. TRACEY,
U. S. Marshal, Western District of Missouri.

And afterwards, to wit, on the 19th day of June, 1890, a notice was filed in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

THE PACIFIC EXPRESS COMPANY, Complainant,
vs.
J. M. SEIBERT, State Auditor, and JOHN M. WOOD, Attorney General.

To J. M. Seibert, state auditor, and John M. Wood, attorney general, defendants in the above-*n*etitled cause:

You are hereby notified that the complainant in the above-entitled cause will, on the 23rd day of June, 1890, apply to the circuit court of the United States for the western district of Missouri, at Kansas City, in said State, for a provisional writ of injunction, therein restraining and enjoining you as prayed for in the bill of complaint.

W. W. MORSMAN,
Solicitor for Complainant.

I do hereby certify that I executed the within writ by delivering a copy thereof to J. M. Seibert, auditor of the State of Mis-
18 souri, at his office, in Jefferson City, Mo., and another copy thereof to John M. Wood, attorney general of the State of Missouri, at his office, in Jefferson City, Mo., in the western district of Missouri, on the 18th day of June, 1890.

JOHN P. TRACEY,
U. S. Marshal.

And afterwards, to wit, on the 23d day of June, A. D. 1890, the following order was filed and entered of record in said cause, to wit:

In the Circuit Court of the United States for the Western District of the State of Missouri, Western Division.

THE PACIFIC EXPRESS COMPANY, Complainant,
vs.
J. M. SEIBERT, Auditor of State, and JOHN M. WOOD, Att'y Gen'l.
} Order for Temporary Injunction.

And now, to wit, on this 23rd day of June, 1890, on presentation and hearing of the bill of complaint in this cause, on the application of the complainant, The Pacific Express Company, for a temporary injunction, the complainant appearing by W. W. Morsman, its attorney, and the defendants appearing by John M. Wood, attorney general for the State of Missouri, and upon argument of counsel, the court being duly advised in the premises, it is now ordered and decreed by the court that a temporary injunction issue herein upon the filing of a bond by the complainant in the penal sum of five thousand dollars, restraining and enjoining the said defendants from in any manner proceeding to enforce the act of the General Assembly of the State of Missouri referred to in the bill of complaint, or any penalty therein provided for, against the said complainant pending the further proceedings in this case and until the further order and decree of the court herein.

(Signed) JNO. F. PHILIPS, *Judge.*

19 And afterwards, to wit, on the 28th day of June, A. D. 1890, a bond for injunction was filed and approved. Said bons is as follows, to wit:

Know all men by these presents that we, The Pacific Express Company, as principal, and Charles S. Wheeler and —— ——, as sureties, are held and firmly bound unto James M. Seibert, auditor of State, and John M. Wood, attorney general, in the penal sum of five thousand dollars ($5,000), lawful money of the United States, well and truly to be paid.

The conditions of the above obligation are such that whereas the above-bounden The Pacific Express Company has instituted in the United States circuit court for the western district of Missouri, in the western division thereof, its suit in equity against the above-named obligees;

Whereas, in the above-mentioned suit, it was, on the 23rd day of June, A. D. 1890, ordered and decreed by the court that a temporary writ of injunction issue against the defendants therein, enjoining and restraining the said defendants from proceeding to execute or to enforce the penalties provided by the act of the General Assembly of the State of Missouri, passed at its last preceding session, entitled "An act to define express companies and to provide for the mode of taxing the same, and to fix the rate of taxation thereon," upon the

filing of a bond by the said Pacific Express Company in the penal sum of five thousand dollars (5,000):

Now, therefore, if the said Pacific Express Company shall pay to the said James M. Seibert, auditor of State, and John M. Wood, attorney general, all damages which may be sustained by them or either of them in consequence of the wrongful issuance of the said writ of injunction, in the event the issuance of the same shall be adjudged to have been wrongful, this obligation to be null and void; otherwise in full force and virtue.

20 Witness our hands this 28th day of June, 1890.

THE PACIFIC EXPRESS CO., [SEAL.]
By J. K. JOHNSTON, *Sup't.*
THE PACIFIC EXPRESS COMPANY,
By W. W. MORSMAN, *Gen'l Attorney.*
CHARLES S. WHEELER. [SEAL.]

Approved June 28th, 1890.
JNO. F. PHILIPS, *Judge.*

And on the 23rd day of June, 1890, a stipulation was filed in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

THE PACIFIC EXPRESS CO., Complainant,
vs.
J. M. SEIBERT & J. M. WOOD, Defendants.

JUNE 23, 1890.

It is hereby stipulated that the defendants need not plead nor enter their appearance until the rule day in September, 1890, but shall furnish counsel for complainant with a copy of their pleading by the 15th day of August, 1890.

W. W. MORSMAN,
Attorney for Pl'ff.
JOHN M. WOOD,
Att'y for Def'ts.

And afterwards, to wit, on the 21st day of July, 1890, a demurrer was filed by defendants in words and figures as follows:

21 In the Circuit Court of the United States for the Western District of Missouri, Western Division. September Term, 1890.

THE PACIFIC EXPRESS COMPANY, Complainant,
vs.
J. M. SEIBERT, State Auditor, and JOHN M. WOOD, Attorney General, Defendants.

Demurrer of J. M. Seibert, State Auditor, and John M. Wood, Attorney General, to Bill of Complaint of the Pacific Express Company.

Now, at this day, come J. M. Seibert, State auditor, and John M.

Wood, attorney general, of the State of Missouri, defendants herein, and demur to the bill of complaint of the Pacific Express Company in the above-entitled cause, and for cause assign the following:

1st. That the bill of complaint does not state facts sufficient to entitle complainant to the relief prayed for.

2nd. That there is no equity in the bill.

3rd. That it appears from the bill that complainant has an adequate remedy at law.

Wherefore defendants pray that the injunction issued herein be dissolved, complainant's bill dismissed, and defendants discharged with their costs.

JAMES M. SEIBERT,
State Auditor.
JOHN M. WOOD,
Att'y General.

JOHN M. WOOD,
Solicitor for Defendants.

I, John M. Wood, solicitor for defendants in the above-entitled cause, hereby certify that in my opinion the foregoing demurrer to bill of complainant is well founded in point of law.

JOHN M. WOOD,
Solicitor for Def'ts.

22 STATE OF MISSOURI, } ss:
County of Cole, }

On this — day of July, 1890, before me personally appeared the above-named defendants, J. M. Seibert and John M. Wood, who signed the foregoing demurrer, and, being by me duly sworn, state that said demurrer is interposed in good faith and not for the purpose of delaying the determination of the above-entitled cause.

J. M. SEIBERT.
JOHN M. WOOD.

Subscribed and sworn to before me this 18th of July, 1890.

[SEAL.] W. S. BROTHERTON,
Notary Public.

My commission expired Feb'y 1, 1893.

And afterwards, to wit, on the 22nd day of July, 1890, a præcipe was filed in the said cause in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division. September Term, 1890.

THE PACIFIC EXPRESS COMPANY, Complainant,
vs.
J. M. SEIBERT, State Auditor, and JOHN M. WOOD, Attorney General, Defendants.

Præcipe.

To the clerk of said court:

Please set the demurrer of the defendants to complainant's bill in the above-entitled cause down for argument.

W. W. MORSMAN,
Solicitor for Complainants.

23 And on the 29th day of October, A. D. 1890, a decree was filed in said cause in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE PACIFIC EXPRESS COMPANY
vs.
J. M. SEIBERT, State Auditor, *et al.*

This cause having been argued on a previous day of the term by W. W. Morsman, Esq., solicitor for the plaintiff, and John M. Wood, attorney general of the State and solicitor for the defendants, and the court being now well advised in the premises—

It is ordered, adjudged, and decreed that the demurrer to the bill be sustained, the temporary injunction heretofore granted dissolved, and the bill of complaint dismissed for want of equity, and that the plaintiff pay all the costs of this suit.

Whereupon the said plaintiff, by its said solicitor, prayed an appeal from this decree to the Supreme Court of the United States, which prayed of appeal is allowed and said appeal granted.

If the plaintiff desires to supersede the decree for the costs in this case pending the appeal from said decree it may do so upon filing a bond, to be approved by the clerk, in the sum of two hundred and fifty dollars; but the decree dissolving the temporary injunction shall not be superseded, stayed, or modified in any respect.

(Signed) HENRY C. CALDWELL,
Circuit Judge.

24 Said bond for appeal is in words and figures as follows:

Know all men by these presents that the Pacific Express Company, a corporation organized under the laws of the State of Nebraska, as principal, and Eli Lewis, Jr., as surety, are held and firmly bound unto James M. Seibert, State auditor of the State of Missouri, and John M. Wood, attorney general of said State, and their successors

in office in the penal sum of two hundred and fifty dollars, well and truly to be paid.

The conditions of the bond are such that—

Whereas the above-bounden The Pacific Express Company has appealed from the decree of the circuit court of the United States for the western division of the western district of Missouri in a certain cause lately pending therein, wherein the said The Pacific Express Company was complainant and the said obligees were defendants:

Now, therefore, if the said The Pacific Express Company shall prosecute its appeal to effect and pay all costs which may be adjudged against it, then this obligation to be void; otherwise in full force and virtue.

Witness our hands this — day of November, 1870.

THE PACIFIC EXPRESS COMPANY,
By W. W. MORSMAN, *Its Gen'l Attorney.*
ELI LEWIS, JR. [SEAL.]

25 The opinion of the court filed in said cause on the 22nd day of October, A. D. 1890, is in words and figures as follows:

26 CALDWELL, *J.:*

Does the bill present a case of equitable jurisdiction? A very clear case must be made out before a Federal court will enjoin the collection of a State tax.

A case for the exercise of such jurisdiction is not made out by showing that the tax is illegal, irregular, or unjust. It must also appear that its collection will be attended with a multiplicity of suits, or the destruction of a franchise, or cast a cloud upon the title to real estate, or some other recognized head of equity jurisdiction must be shown. This being a personal tax, no cloud can be cast on the title to real estate.

The Supreme Court of the United States, speaking by Mr. Justice Miller, states the rule in these terms:

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship, or injustice of the law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

State Railroad Tax Cases, 92 U. S., 614.

The case last cited and the case of Dows *vs.* Chicago, 11 Wall., 108, are leading cases on this subject. These cases have been cited and their doctrine approved, applied, and illustrated in many other cases in that court, and they furnish rules of decision obligatory on all Federal courts.

It is needless to repeat here the reasoning in support of these
27 rules. It is set forth with convincing power in the two cited and in many others.

Hannewinkle *vs.* Georgetown, 15 Wall., 548.

Tennessee *vs.* Sneed, 96 U. S., 69.

The plaintiff contends that, in addition to the alleged illegality of the tax, there are, in this case, special grounds of equitable jurisdiction.

It is said that if the tax is not paid the plaintiff incurs a penalty of one hundred dollars per day, and is prohibited from doing business in the State during the period it refuses to pay the tax, and that it is competent for the State to bring a separate suit for the penalty that accrues each day. All this is undoubtedly true, but the plaintiff has in its power to avert all these penalties and disasters by paying the tax. The tax is a personal one, touching which Judge Cooley says:

"When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult in most cases to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount."

Cooley on Taxation, p. 772.

In Brewer *v.* Springfield, 97 Mass., 152, it is said:

"Until the plaintiffs have been compelled to pay the tax which they allege to have been illegally assessed upon them, they have suffered no wrong. When they have paid it they can recover it back by an action at law, which would furnish them an adequate and complete remedy."

The sound rule is that it is better the citizen should pay
28 an alleged illegal tax and test its legality in a suit at law to recover the money back than that the State should be deprived of the revenues essential to its existence during the life of a chancery suit, which is usually protracted.

In Dows *vs.* City of Chicago, *supra*, the court say:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind distinguishing it from a common trespass and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. . . . And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city

to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection, nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

The Government of the United States has made this rule statutory. An act of Congress declares that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Sec. 3224 Rev. Stat. U. S:

29 Appeals are given to the executive departments, and if the party aggrieved does not obtain satisfaction in this mode there are provisions for recovering the tax, after it has been paid, by suit against the collecting officer.

Referring to this statute, the Supreme Court say:

"And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. See Cheatham *v.* Norvell, decided at this term; Nickoll *v.* United States, 7 Wall., 122; Dow *v.* Chicago, 11 Wall., 108."

State Railroad Tax Cases, *supra.*

Similar statutes are in force in some of the States.

Tennessee *v.* Sneed, *supra.*

These statutes are legislative recognitions of the principle that no government can permit its claims for public taxes on the citizen to become the subject of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others.

Murray's Lessee *et al. vs.* Hoboken, L. & I. Co., 18 How., 272–282.

Speaking of the rule which requires the citizen to pay the tax and test its validity in a suit for its recovery, the Supreme
30 Court say:

"There is nothing illegal or even harsh in this. It is a wise and reasonable precaution for the security of the Government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important that the payment of costs."

Tennessee *vs.* Sneed, *supra.*

The citizen cannot appeal to equity for an injunction to stay the collection of a personal tax if he has an adequate remedy at law,

and he has an adequate remedy at law if after paying the tax he can sue the State or the officers who collected the tax to recover it back.

And his remedy at law is also adequate in the case of a personal tax if the State can only collect the tax by suit or other proceeding that will afford the citizen an opportunity to contest its validity without incurring penalties or forfeitures in the meantime.

We have not been cited to any statute or decision of the supreme court of the State showing that if the plaintiff paid the tax a suit would lie against the State or her officer to recover it back. In the view taken by the court of the other points in the case the decision of this question one way or the other would not change the result, and the court will therefore assume, for the purposes of this case, that by the laws of Missouri an action could not be maintained to recover back a tax like this.

The act we are now considering does not contemplate a suit to collect the tax. The amount of the tax cannot be known until the company makes a return of its earnings, and the making of this return and the payment of the tax are by the provisions of
31 the act enforced by the imposition of a penalty of one hundred dollars per day and the denial of the right to do business in the State so long as the company is delinquent.

While it is true that the plaintiff might contest the validity of the act in any suit brought by the State to collect the penalty imposed for the non-payment of the tax, that would not be an adequate remedy, for the reason that during the pendency of such a suit the penalty of one hundred dollars would be accruing each day and the plaintiff be denied the right to carry on its business in the State.

It would take months and possibly years to reach a final decision of the case, and, if that decision should be favorable to the State, the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of one hundred dollars per day for the whole period and the destruction of its business in the State and probably great injury to its business in other States. Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be or may be attended by the imposition of heavy penalties and forfeitures; and upon this ground and because an action will not lie under the laws of Missouri to recover back the tax, if paid, equity has jurisdiction in this case.

Multiplicity of suits having also been earnestly urged upon the court as a ground of jurisdiction in the case, it is proper to consider that question.

It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each
32 day's penalty, the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it or to its officers acting for and in its name a litigious

and vindictive spirit or a purpose needlessly to vex and harrass the citizen with lawsuits.

Whatever the rule may be in the case of natural persons, the court will presume that a State is incapable of such a vulgar passion, and until the fact is shown to be otherwise will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights.

The disposition of the case on its merits depends on the construction of the statute imposing the tax. The first question is, Does the tax imposed by the act upon the express company's receipts amount to a regulation of or an interference with interstate commerce? The tax is imposed on the receipts for "all sums earned or charged for the business done within this State." These words qualify the whole act. They are are plain and unambiguous.

The words "for the business done within the State" *ex vi termini* import business begun and ended in the State and include only intrastate and not interstate commerce. The interjection of the intensifying words "wholly" or "entirely" would not alter their meaning or change their legal effect.

Interstate commerce is not "business done within" the State of Missouri; it is business done between two or more States. A package carried by the plaintiff from Omaha to St. Louis is not business done within the State of Nebraska or the State of Missouri, but is business done between those two States.

A contract for the carriage of goods from one State to another is an entire contract and is an interstate contract, and the carriage of the goods under such a contract is interstate commerce
33 and is not "business done within" any one of the States from, through, and to which they are carried on such contract.

Before the passage of this act the Supreme Court of the United States had decided in several cases that it was not competent for a State to levy a tax upon earnings derived from interstate commerce.

W. U. Tel. Co. *v.* Alabama, 132 U. S., 472.
Leloup *v.* Post of Mobile, 127 U. S., 640, and cases there cited.
Rotterman *v.* Western Union Tel. Co., 127 U. S., 411.
Lyng *v.* State of Michigan, 135 U. S., 161.

The law as contained in these decision- was common knowledge before the passage of this act, and it is obvious that the General Assembly had these decisions in view in drafting the act. The limitation of the tax to the receipts on business done within the State is explicit and is three times repeated. The legislative intent not to impinge on interstate commerce is manifest.

But if the meaning of the act was doubtful the doubt must be resolved in favor of its validity. It is a canon of construction that when an act of the Legislature admits of two interpretations, one of which brings it within and the other presses it beyond their constitutional authority, the courts will adopt the former construction.

But if the act could be construed to embrace the earnings derived

from interstate commerce that would not render the whole act invalid. It would still be valid as to the earnings derived from intrastate commerce, and the plaintiff would have to pay the tax on the receipts of its business done within the State.

Rotterman *v.* W. U. Tel. Co., 127 U. S., 411.
W. U. Tel. Co. *v.* Alabama, 132 U. S., 472.

34 The next contention is that the act deprives the plaintiff of the equal protection of the laws secured to it by the fourteenth amendment to the Constitution of the United States and violates the rule of uniformity and equality of taxation required by that article and the constitution of the State of Missouri.

This contention is rested on the words of the act that limits its operation to express companies that carry "by express on contract with any railroad or steamboat company."

Neither the Constitution of the United States nor of the State of Missouri requires taxes to be levied by a uniform rule upon all descriptions of property, or that all taxes on franchises, licenses, and privileges should be equal or imposed by a uniform rule. For purposes of taxation, property and franchises, licenses and privileges, may be classified and the different classes valued or taxed by different methods.

The pursuits of mankind have become so varied and property has assumed so many forms, many of them artificial and complicated, that different classifications of property for purposes of taxation and the valuation of different classes by different methods are rendered imperatively necessary; and franchises, licenses, and privileges may be classified according to their several natures and each class taxed a different rate and by a different method, or some may be taxed and others not.

There is no evasion of the requirement of equality or uniformity so long as all in the same class are subject to the same tax under the same conditions. These principles have been repeatedly affirmed by the Supreme Court of the United States. In the latest utterances of that court on this subject it is said:

"The provision in the fourteenth amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting
35 its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them." . . . We think that we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation."

Bell's Gap Railroad Company *v.* Pennsylvania, 134 U. S., 232, p. 237.

"But the amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind of property to a different rate, distinguishing between franchises, licenses, and privileges and visible and tangible property and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates or the objects sought to be obtained by it; and when such legislation applies to artificial bodies it is not open to objection if all such bodies are treated alike under similar circumstances and conditions in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint-stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against
36 another of the same class. See Barbier *v.* Connolly, 113 U. S., 29–32; Soon Hing *v.* Crowley, 113 U. S., 703–709; Missouri Pacific Railway *v.* Humes, 115 U. S., 512–523; *Missouri Pacific Railway Co. v. Humes*, 115 *U. S.*, 512–523; Missouri Pacific Railway *v.* Mackey, 127 U. S., 205–209; Minneapolis Railway Co. *v.* Beckwith, 129 U. S., 26–32."

Home Insurance Co. *vs.* New York State, 134 U. S., 594, p. 606–607.

In the light of the doctrine of these cases it is plain the act we are considering is not in contravention of the fourteenth amendment.

The act imposes the same tax on all express companies in the same circumstance and conditions.

It is not averred in the bill and was not contended in argument that any person, company, or corporation engaged exclusively in the express business owns and operates its own railroads and steamboats for the exclusive purpose of carrying its express messengers and freights. There are no such express companies.

In the matter of the express companies, Interstate Commerce Commission Rep't 349, p. 367, the question was presented to the commission whether express companies were within the provisions of the interstate commerce act.

In enumerating the reasons set up by the express companies against the claim that they were within the act, the commission say:

"The words 'its railroad,' the express companies say, exclude the idea that they are intended by the law, for they have no railroads; they neither own nor operate any railroad lines;" and the commission concurred in this view.

The act of the Legislature of Missouri applies to express companies proper, and contains a brief and, as far as it goes, accurate definition of them. From the origin of express companies down to the present time a distinguishing and uniform feature
37 of their method of conducting business has been the hiring

of railroad and water transportation for their messengers and freights. It is a common carrier that does not own any means of transportation, but hires other common carriers—railroad and steamboat companies—to carry its freight and messengers.

It may be defined to be a common carrier that carries at regular and stated times over fixed and regular routes money and other valuable packages which cannot be conveniently or safely carried as common freight, and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge and custody of its own messenger, on passenger steamers and express and passenger railway trains which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights, and within cities and towns or other defined limits it collects from the consignors and delivers to the consignees at their places of business the goods that it carries.

Express Cases, 117 U. S., 1.
Retzer *v.* Wood, 109 U. S., 185.
1 Interstate Com. Rep., p. 273.
In the matter of the Express Companies, 1 Interstate Commerce R., 349.

The court is bound to take judicial notice of a matter of public history and facts notorious to persons of ordinary intelligence. It would be discrediting to the court to affect to believe that there was any person in Missouri conducting an express business without the use of railroad or steamboat transportation. The freighting
38 business of this country was once carried on in wagons propelled by animal power, on dirt roads; but that method of transporting common freights has been rendered obselete by the railroads and steamboats. Such a thing as an express company disassociated from transportation by rail or steamer is unknown.

In the case of Hoey, suing as a shareholder in the Adams Express Company against these same defendants, submitted for decision with this case and depending on the same questions, the bill alleges that the Adams Express Company, in conducting its business, "utilizes over nineteen thousand miles of interstate railway communication."

It is true there are in cities and towns persons and corporations that carry goods and parcels in wagons or carts from one place in a city or town and its vicinity to another as chance may offer, but that is not an express business. A statute of the United States provided "that any person, firm, company, or corporation carrying on or doing an express business shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business."

Under this statute the collector of internal revenue required one Ritzer to pay a tax for carrying on an "express business." Ritzer's business was the carrying of goods, freights, and baggage in wagons

between New York and Brooklyn, and from one place in Brooklyn to another place in the same city.

He did not run regular trips nor over regular routes, but when and where he had orders. Upon these facts the Supreme Court of the United States held that Ritzer was not carrying on an "express business."

The court said: "We are of the opinion that the plaintiff was not liable to this tax, because he did not carry on or do an 'express business' within the meaning of the statute. Although he
39 carried goods between New York and Brooklyn and from one place to another in either city, he did so solely on call and at special request. He did not run regular trips or over regular routes or ferries. He was no more than a drayman or truckman doing a job when ordered. The fact that he had a place in Brooklyn where orders could be left on a slate made no difference. The words 'express business' in the statute must have the meaning given them in the common acceptation. An 'express business' involves the idea of regularity as to route or time or both; such is the definition in the lexicons."

Retzer *v.* Wood, 109 U. S., 185, p. 187.

But suppose a business like Ritzer's could be called an express business; it differs so essentially in methods and conditions from the business defined by the act we are considering that it is obvious that they may be differently classed for taxation, and that the rule of equality and uniformity would not be violated by varying either the rate or the method of taxing them.

The Legislature might well consider a tax on the teams and wagons sufficient in the one case and a tax on the earnings necessary in the other, or it might exempt the one and tax the other without impinging on the fourteenth amendment.

See Gibson Co. *v.* Pullman South. Car Co., 42 Fed. Rep., 572, p. 574.

The express business taxed by this act differs so materially from that conducted by other common carriers and is so clearly defined and understood to be a distinct and separate branch of business that it was eminently proper, if not imperatively necessary, if it was to be taxed at all, for the Legislature to class it by itself, and, having so classed it, it was competent for the Legislature to impose such a tax on its earnings for business done within the State as its wisdom dictated, not in excess of any limit prescribed by the constitution of the State.

40 In the first annual report of the Interstate Commerce Commission, 1887, p. 13, it is said:

"Some of the railroad companies, however, have undertaken to do the express business on their own lines through their own agencies. The Baltimore and Ohio Railroad Company did this for a time and then sold the business to one of the existing express companies. Some of the western railroads combine for the purpose and for convenience create a nominal corporation to do the business over their

several lines and divide the net proceeds. . . . There is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation."

When a railroad company, by the addition of a new bureau or department and the adoption of new methods in the conduct of its business, qualifies itself to do the business commonly done by an express company it does not thereby itself become an express company. Such an expansion or extension of its business as a common carrier works no change in its corporate character, nor does it escape taxation on such new business. All schemes for the taxation of railroads, however much they may vary in details, are intended to include and do include in one way or another a tax on all their property, income, and franchises. If the tax is not in terms laid upon their business and income, due regard to these is had in imposing the tax on their property and franchises.

It may be conceded that *they* are no means of ascertaining whether a railroad company pays more or less tax on the earnings derived from its express business than is paid by an express company; but if it is admitted to be less, that is not the want of equality that falls under the ban of the constitution, but it results from the difference in the constitution, methods, and business pursuits
41 of the two corporations, which justifies the Legislature in classifying them differently for purposes of taxation and taxing them by different methods.

What is true of one railroad company is true of any association of railroad companies. All business they do as railroad companies is taxed in the general scheme for the taxation of railroads.

It is not alleged in the bill in this case that the persons and corporations which it is averred are carrying goods "by freight and express" are not taxed. The complaint is that they are taxed at a different rate and by a different method from that applied to the plaintiff and all others who carry freight "by express on contract with any railroad or steamboat company."

The plaintiff's contention is that those carriers who own their transportation and are common carriers of all manner of freights shall be taxed at the same rate and by the same method as those carriers who hire their transportation and whose business is limited to the carriage of express matter; in a word, that for purposes of taxation railroad companies shall be classed with express companies and taxed at the same rate and by the same rule.

There are inherent and fundamental differences in the corporate franchises, rights and duties, property and methods of business of a railroad company and an express company. These differences forbid their being classed together for purposes of taxation. Such a classification would be extremely incongruous. Because of this difference between the railroad companies and the express companies the latter could not be brought within the purview of the interstate commerce act.

Case of the Express Companies, 1 Inter. St. Com. Rep., 349.
United States *vs.* Morsman, 42 Fed. Rep., 448.

Except as to their visible and tangible property, there seems to have been no law for taxing express companies until the passage of this act, for the Legislature, in the third section of the act,
42 assigns as a reason for putting the action in force from its passage the fact of "there being no law in this State by which such companies are taxed."

Will any one seriously contend that before the passage of this act railroad companies could have successfully resisted the payment of taxes because express companies were not taxed, or that they can now do so because the method of taxation is different?

If the rule contended for by the plaintiff is sound it must be reciprocal, and if express companies are not liable for the tax because they are not classified for taxation with railroad companies and taxed in the same manner, then the railroad companies can object to paying taxes because they are not classified with express companies and taxed by the same method. For purposes of taxation they have no relation to each other and the method of taxing them may be as widely different as the Legislature in its wisdom chooses to make it.

The demurrer to the bill is sustained, the temporary injunction dissolved, and the bill dismissed for want of equity.

43 UNITED STATES OF AMERICA, *sct:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the record and proceedings in the cause therein named as fully as the same appears in my office.

Seal of the United States Circuit Court, Western Division, for the Westrict District of Missouri.

Witness my hand as clerk and the seal of said court. Done at office, in the city of Kansas, Missouri, this 8th day of November, A. D. 1890.

WARREN WATSON, *Clerk*,
By —— ——, *D. C.*

Endorsed on cover: W. Missouri C. C. U. S. No. 1558. The Pacific Express Company, appellant, *vs.* James M. Seibert, State auditor of the State of Missouri, and John M. Wood, attorney general of the State of Missouri. Filed November 17, 1890.

FILED
NOV 17 1890
JAMES H. McKENNEY
Clerk

IN THE SUPREME COURT
OF THE UNITED STATES.

THE PACIFIC EXPRESS COMPANY,
Appellant.

vs.

JAMES M. SEIBERT,
State Auditor of Missouri,
AND,
JOHN M. WOOD,
Attorney-General of Missouri.

} IN EQUITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

MOTION FOR A WRIT OF SUPERSEDEAS.

Of Counsel.

Solicitor for Appellant.

GIBSON MILLER & RICHARDSON, PRINTERS, OMAHA

FILED
NOV 17 1890
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES.

THE PACIFIC EXPRESS COMPANY,
Appellant,
vs.
JAMES M. SEIBERT,
State Auditor of Missouri,
AND,
JOHN M. WOOD,
Attorney-General of Missouri.
} IN EQUITY.

1558

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

MOTION FOR A WRIT OF SUPERSEDEAS.

J. M. Woolworth
Of Counsel.

W. W. Morsman
Solicitor for Appellant.

GIBSON MILLER & RICHARDSON, PRINTERS, OMAHA

IN THE SUPREME COURT
OF THE UNITED STATES.

THE PACIFIC EXPRESS COMPANY,
Appellant,
vs.
JAMES M. SEIBERT,
State Auditor of Missouri,
AND,
JOHN M. WOOD,
Attorney-General of Missouri.
} IN EQUITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

MOTION FOR A WRIT OF SUPERSEDEAS.

To the Honorable Chief Justice and Associate Justices of said Court:

The Pacific Express Company, complainant and appellant in the above entitled cause, now prays the Court to grant a writ of supersedeas, upon the filing of such bond as this Court shall prescribe, to the ~~Judge of the Circuit Court and the~~ defendants herein, continuing the temporary injunction and super-

seding and suspending the decree of the Circuit Court, so far as the same dissolves the temporary injunction, pending the trial of the appeal in this Court, or for such other relief in the premises as this Court can give, and the said the Pacific Express Company now avers:

1. That heretofore, to wit., on the 16th day of May, 1889, the Legislature of Missouri passed an act entitled "An act to define express companies and to prescribe the mode of taxing the same and to fix the rate of taxation thereon," by which there was imposed upon express companies, as defined by the act, a tax of 2 per cent upon gross earnings from "business done within the State," payable to the State Treasurer; and, by the terms of which it was provided, that if any express company, as defined by the act, should fail to report its gross earnings to the State Auditor and pay the tax imposed to the Treasurer of the State after the 30th day of June, 1890, and each year thereafter, such company should forfeit one hundred dollars per day, to be collected by an action instituted by the State Auditor and prosecuted by the Attorney-General, and be prohibited from carrying on its business in the State until payment should be made.

2. That by the terms of the act of the Legislature of Missouri an express company was defined to be—

"Any person, persons, joint stock associations, company or corporation * * * * conveying to, from or through this State, or any part thereof, money, packages, gold, * * * merchandise or effects of any kind by express, on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof." * * * *

3. On the 17th day of June, 1890, the complainant, a corporation of Nebraska, filed its bill in equity in the Circuit Court for the Western District of Missouri upon the following grounds:

(*a*). That the act of the Legislature embraced inter-state commerce, and to that extent was void.

(*b*). That the act, in defining what should constitute an express company, limited its operation to persons and corporations engaged in carrying by express *on contract* with railroad and steamboat companies, and imposed the tax upon such persons and corporations, while it exempted those persons and corporations (as, for example, railroad or steamboat companies), who carried on, or might carry on, the same business upon their own lines of transportation; that the complainant carried on its business "on contract" with railroad and steamboat companies, and therefore the effect of the act was to impose the tax upon complainant and not upon persons and corporations who carried on the same business upon their own lines of transportation, thereby denying to complainant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and thereby imposing a tax upon complainant which is not "uniform upon the same class of subjects within the territorial limits of the authority levying the tax," in violation of section three (3) of article ten (10) of the Constitution of the State of Missouri.

(*c*). There was a prayer for an injunction "restraining and enjoining the defendants and each of them from in any manner proceeding to enforce said act, or any penalty therein provided for, against your orator, pending the trial of this cause and until the further order of this Court, and that the injunction be finally made perpetual." * * * *

4. A temporary injunction was allowed on the application of the complainant and issued.

5. On the 21st, day of July, 1890, the defendant demurred to the bill.

6. On the 29th day of October, 1890, after argument, the

Court rendered a final decree and opinion, in writing, sustaining the demurrer and dismissing the bill, which decree also recites:

"Whereupon the said plaintiff, by its said solicitor, prayed an appeal from this decree to the Supreme Court of the United States, which prayer of appeal is allowed and said appeal granted.

"If the plaintiff desires to supersede the decree for the costs in this cause, pending the appeal from said decree, it may do so upon filing a bond, to be approved by the Clerk, in the sum of two hundred and fifty dollars, but the decree dissolving the temporary injunction shall not be superseded, stayed or modified in any respect."

And on the 5th day of November, 1890, appellant filed its bond, as provided by the decree, which was approved.

7. And plaintiff avers that a writ of supersedeas from this Court, or other appropriate remedy, is now necessary to render the appellate jurisdiction of this Court effectual, and to prevent the object of the appeal from being lost, pending a decision by this Court.

8. The record in this cause not being printed, appellant annexes a printed copy of so much as is necessary to the hearing of this motion.

J. M. Woolworth

Of Counsel.

W. W. Morsman

Solicitor for Appellant.

BILL OF COMPLAINT.

Your orator, the Pacific Express Company, respectfully represents:

First—That it is a corporation organized under, and created by, the laws of the State of Nebraska, and for the purpose of the jurisdiction of this Court, a citizen of said State of Nebraska; and the defendant, J. M. Seibert, is the State Auditor of the State of Missouri, and the defendant, John M. Wood, is the Attorney-General of the State of Missouri, each of said defendants being a citizen of said State of Missouri, and residing at the city of Jefferson, in said last named State; and that the matter in dispute in this suit exceeds the sum of two thousand dollars exclusive of interest and costs.

Second—That on the 16th day of May, 1889, your orator was, and all of the time since has been, and now is, engaged in the business of conveying money, packages, gold, silver, plate, articles, goods and merchandise, to, from and through the State of Missouri, and various parts of said State by express; and that in the prosecution of its said business your orator did not at the time aforesaid, have or provide its own transportation, but carried on its said business and conveyed the discriptions of property aforesaid within the said State of Missouri over the railroad of, and on contract with, the Missouri Pacific Railroad Company and various other railroad companies whose lines of road are, and have been, operated within said State.

Third—That in the prosecution of its said business your orator did, at the time and during the period aforesaid, and now does, receive property of the descriptions aforesaid, at numerous points or towns within the States of Nebraska, Kansas, Texas, Colorado and many other States of the United States, and convey the same for its patrons, for hire, from such points, to the various points or towns within the said State of Mis-

souri; and your orator did, and does now, receive property of the discriptions aforesaid at various points or towns within the State of Missouri and convey the same, for hire, for its patrons to numerous points or towns within the States of Nebraska, Kansas, Texas, Colorado and many other States of the United States; and your orator did, and does now receive property of the discriptions aforesaid at various points or towns within the said State of Missouri and convey the same, for hire, for its patrons to numerous other points or towns within the said State of Missouri, delivering said property at destination to the person or persons there to whom the same is consigned.

Fourth—That at the time and during the period aforesaid, there were, and there are now, other persons, co-partnerships, associations and corporations residing and doing business within the State of Missouri, who were engaged in conveying to, from and through the said State and various parts of the same, goods and property of the discriptions aforesaid, for hire, by freight and by express, but not on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof, within said State; such persons, co-partnerships, associations and corporations being either provided with their own transportation facilities, or procuring the same by hire from other persons, not a railroad or steamboat company, or the manager, lessee, agent or receiver thereof.

Fifth—That on said first-named date, the General Assembly of the State of Missouri passed an act, entitled "An act to define express companies and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon," and which said act took effect on the 19th day of May, 1889, whereby it was enacted, that:

Any person, persons, joint stock association, company, or corporation * * * * conveying to, from or through the State of Missouri, or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise or effects of any kind,

by express, on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof, but not including railroad companies or steamboats engaged in the ordinary transportatation of merchandise and property in said State, should be deemed an express company.

And by another section of the same act, it was also enacted, that:

Every such express company should make an annual report under oath to the State Auditor of said State, showing the entire receipts for business done within said State, of each agent of such express company doing business within the State for the year next preceding the first day of April in each year, including therein such company's proportion of gross receipts for business done by such company with other companies.

And by the said section it was further provided, that:

The report of such company should contain an abstract of the amount received in each county, and the total amount received for all the counties of the State; and that, in case of failure or refusal of such express company to make such report on or before the first day of May, it should then be the duty of each local agent within the State to make such report of the gross receipts of his agency on or before the first day of June.

And by the said act it was further provided, that:

When such statement should be made, and after deducting from the gross receipts shown thereby, the amounts actually paid by such express company to the railroads or steamboats within the said State for the transportation of freight for such express company within said State, such express company should pay into the Treasury of the State the sum of two dollars on each one hundred dollars of such receipts.

And by said act it was further provided, that:

Nothing contained in the said act shall release any such express company from the assessment and taxation of its tangible property in the manner that other tangible property is assessed and taxed in said State.

And by said act it is further provided, that:

If any such express company shall fail for more than thirty days after the first day of June in each year to make to

the State Auditor the reports aforesaid, and to pay the required tax thereon, then such express company shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the State of Missouri on the relation of the State Auditor, and that such action shall be prosecuted by the Attorney-General of the State, and that such express company shall be prohibited from carrying on said business in the State of Missouri until such payment is made.

A copy of the act of the General Assembly of the State of Missouri above referred to is hereunto annexed and made part hereof, for convenient reference, and marked "A."

Sixth.—Your orator further avers that if the act aforesaid, of the General Assembly of the State of Missouri, is a valid law, your orator would be required to pay into the State Treasury for the year ending April 1st, 1890, the sum of

dollars; and if the said act be a valid law only in respect to gross receipts upon such business as your orator has done as aforesaid between points wholly within the State of Missouri, and void as to the gross receipts upon such business as your orator has itself, or in connection with other carriers, done between points within the State of Missouri and points in other States, then your orator would be required to pay the sum of three thousand one hundred and forty-three dollars and eighty-four cents, for the period aforesaid.

Your orator avers that it does not seek to escape any just burden of taxation legally imposed upon it, and that if it shall be adjudged that said act is a valid law, or valid to the extent of gross receipts upon the transportation business done by your orator originating and terminating wholly within the State of Missouri, your orator is ready and willing and will promptly pay the sum imposed upon it, as required by the terms of said act.

Seventh.—But your orator avers that the said act of the General Assembly of the State of Missouri is not a valid law, and is not binding upon your orator. That a large proportion of the gross receipts of your orator, upon business done within the said State of Missouri, is for transportation charges upon property of the descriptions contained in said act, being carried by your orator, or by your orator and its connecting lines, from points or towns outside the State of Missouri to points or towns within said State of Missouri and from points or towns within said State of Missouri, to points or towns situated in other States. That such transportation is commerce between different states, and the tax imposed by said act is a tax upon such commerce; and so far, your orator avers, the said act is in violation of that provision of the Constitution of the United States which vests in the Congress of the United States the exclusive right to regulate commerce among the several States.

Eighth.—Your orator further avers that neither the said tax of two per cent. nor any other equivalent tax, is imposed by the said act, or by any law of the State of Missouri, upon other common carriers of goods; or upon persons, associations or corporations engaged, or who may engage, in conveying property and goods of the descriptions contained in said act by express, or upon the business or gross receipts of such common carriers, persons, associations and corporations, who do not hire transportation by "contract with any railroad or steamboat company, or the managers, leesees, agents or receivers thereof;" and your orator further avers that, by the law of the State of Missouri it was at the date of the passage of the act herein before mentioned, and has ever since been, provided in respect to all other ad valorum and percentum taxes, that the assessment of persons, property, and business for the purpose of such taxation should be equalized between

persons, associations and corporations responsible for the payment of such tax by a County Board of Equalization with the right of appeal from the assessment to such board; and that such assessments should be equalized as between the several counties of the State by the State Board of Equalization; whereas, by the act aforesaid, no provision is made for the equalization of the tax therein provided for, either by the County Boards of Equalization or said State Board, nor any right of appeal, nor is any such equalization or right of appeal provided for by any other law of the State of Missouri. Your orator therefore avers that said act denies to it the equal protection of the laws of the State of Missouri, in violation of that provision of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State to deny to any person within its jurisdiction the equal protection of the laws; and, said tax, imposed by said act, not being imposed upon all of the persons, associations, corporations, property or business of the class to which it applies and to which your orator, its business, and its property belong, the tax so imposed is wanting in uniformity, and in violation of Section three (3) of Article ten (10) of the Constitution of the State of Missouri, by which it is provided that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"

Ninth.—Your orator further avers that it is provided by Section four (4) of Article ten (10) of the Constitution of the State of Missouri that "all property subject to taxation shall be taxed in proportion to its value;" and by Section eight (8) of the same article, that "the State tax upon property shall not exceed twenty cents on the hundred dollars valuation." That the said tax not being based upon value, nor levied by any rule of proportion, nor subject to any limit, other than the volume of business of the express companies subjected to it, the

said act is in violation of the aforesaid provisions of the Constitution of the State of Missouri.

Tenth.—Your orator further avers, that the defendant herein, notwithstanding the facts herein before set forth, claim and give out that the said act of the State of Missouri is a valid law, and that your orator is under legal obligation and duty to make the annual report and pay the tax provided for in said act; and that they, the said defendants, being the officials charged by the terms of said act with the duty of enforcing its provisions, are under an official duty and obligation to demand compliance by your orator with the provision of said act, and to coerce such compliance by proceeding to enforce the penalties therein provided for. That unless restrained by the orders and process of this Court from so doing the said defendants will proceed as if to enforce the same, by instituting legal proceedings for the collection of the penalties therein prescribed, and to prohibit your orator from carrying on its said business within the State of Missouri, whereby your orator will be subjected to, and harrassed by, a multiplicity of suits and suffer irreparable loss and injury for which it has no adequate remedy at law.

Wherefore, your orator, to the end that it may be justly and equitably relieved, now prays the court to grant its process by subpoena directed to the said J. M. Seibert, State Auditor of the State of Missouri, and said John M. Wood, Attorney-General of the State of Missouri, the defendants hereinbefore named, commanding them, and each of them, to appear herein and answer your orator's said Bill of Complaint, but not under oath, an answer under oath being hereby expressly waived. And your orator further prays that the said act of the General Assembly of the State of Missouri be adjudged to be unconstitutional and void, and that an injunction be granted to your orator restraining and enjoining the said

defendants, and each of them, from in any manner proceeding to enforce the said act, or any penalty therein provided for, against your orator, pending the trial of this cause and until the further order and decree of the Court, and that said injunction be finally made and decreed to be perpetual, and for such other and further relief in this behalf as may be equitable and just.

EXHIBIT "A."

AN ACT to define express companies, and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon.

SECTION 1. Any person, persons, joint-stock association, company or corporation incorporated under the laws of any State, Territory or country, conveying to, from or through this State, or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise or effects of any kind by express, on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this State), shall be deemed an express company.

SEC. 2. Every such express company shall annually, between the first day of April and the first day of May, make and deliver to the State Auditor a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this State of each agent of such company doing business in this State for the year next preceding the first day of April, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies; *Provided*, that the amount which any express company actually pays to the railroads or steamboats within this State for the transportation of their freight within this State may be deducted from the gross receipts of such company as above ascertained; and, provided further, that said amount paid to the various railroad or steamboat companies for transportation shall be itemized, showing the amount paid to each railroad or steamboat company; and, provided further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or charged for the business done within this State for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount

received in each county and the total amount received in all the counties. In case of the failure or refusal of such express company to make such statement before the first day of May, it shall then be the duty of each local agent of such express company within this State, annually, between the first day of May and the first day of June, to make out and forward to the State Auditor a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of April. When such statement is made such express company shall, at the time of making the same, pay into the Treasury of the State the sum of two dollars on each one hundred dollars of such receipts; and any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided, and to pay the required tax thereon, shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to recover by an action in the name of the State of Missouri, on the relation of the State Auditor, in any Court of competent jurisdiction, and the Attorney-General shall conduct such prosecution; and such company, corporation or association so failing or refusing shall be prohibited from carrying on said business in this State until such payment is made.

SEC. 3. There being no law in this State by which such express companies are taxed, creates an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage.

Approved May 16th, 1889.

OPINION.

CALDWELL, J.

Does the Bill present a case of equitable jurisdiction? A very clear case must be made out before a Federal Court will enjoin the collection of a State tax.

A case for the exercise of such jurisdiction is not made out by showing that the tax is illegal, irregular or unjust. It must also appear that its collection will be attended with a multiplicity of suits, or the distruction of a franchise, or cast a cloud upon the title to real estate; or some other recognized head of equity jurisdiction must be shown. This being a personal tax no cloud can be cast on the title to real estate.

The Supreme Court of the United States, speaking by Mr. Justice Miller, states the rule in these terms:

"We do not propose to lay down in these cases any absolute limitation of the powers of a Court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valutaion, or hardship or injustice of the law, either before or after payment of taxes, will not justify a Court of equity to interpose by injunction to stay collection of a tax."

State Railroad Tax Cases, 92 U. S., 614.

The case last cited, and the case of Dows vs. Chicago, 11 Wall., 108, are leading cases on this subject. These cases have been cited, and their doctrine approved, applied and illustrated in many other cases in that Court, and they furnish rules of decision obligatory on all Federal Courts.

It is needless to repeat here the reasoning in support of these rules; it is set forth with convincing power in the two cited, and in many others.

Hannewinkle vs. Georgetown, 15 Wall., 548.

Tennessee vs. Sneed, 96 U. S., 69.

The plaintiff contends that, in addition to the alleged illegality of the tax, there are, in this case, special grounds of equitable jurisdiction.

It is said that if the tax is not paid the plaintiff incurs a penalty of one hundred dollars per day, and is prohibited from doing business in the State during the period it refuses to pay the tax, and that it is competent for the State to bring a separate suit for the penalty that accrues each day. All this is undoubtedly true, but the plaintiff has it in its power to avert all these penalties and disasters by paying the tax. The tax is a personal one, touching which Judge Cooley says:

"When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult in most cases to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount."

Cooley on Taxation, p. 772.

In Brewer vs. Springfield, 97 Mass., 152, it is said:

"Until the plaintiffs have been compelled to pay the tax which they allege to have been illegally assessed upon them, they have suffered no wrong. When they have paid it they can recover it back by an action at law, which would furnish them an adequate and complete remedy."

The sound rule is, that it is better the citizen should pay an alleged illegal tax, and test its legality in a suit at law to recover the money back, than that the State should be deprived of the revenues essential to its existence during the life of a chancery suit, which is usually protracted.

In Dows vs. City of Chicago, *supra*, the Court say:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a Court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threat-

ened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. * * * And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal the plaintiff protesting against its enforcement might have had his action after it was paid against the officer of the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection, nor could he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

The Government of the United States has made this rule statutory. An act of Congress declares that:

"No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any Court."

Sec. 3224, Rev. Stat. U. S.

Appeals are given to the executive departments; and if the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer.

Referring to this statute, the Supreme Court say:

"And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if Courts of Justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to Courts of Justice. (See Cheatham vs. Norvell, decided at this term; Nickoll vs. United States 7 Wall., 122; Dow vs. Chicago, 11 Wall., 108.)"

State Railroad Tax Cases, *supra.*

Similar statutes are in force in some of the States.

Tennessee vs. Sneed, *supra.*

These statutes are Legislative recognitions of the principle that no government can permit its claims for public taxes on the citizen to become the subject of judicial controversy according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others.

Murray's Lessee et al. vs. Hobroke, I & I Co., 18 How., 272–282.

Speaking of the rule which requires the citizen to pay the tax, and test its validity in a suit for its recovery, the Supreme Court say:

"There is nothing illegal or even harsh in this. It is a wise and reasonable precaution for the security of the Government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs."

Tennessee vs. Sneed, *supra.*

The citizen cannot appeal to equity for an injunction to stay the collection of a personal tax if he has an adequate remedy at law; and he has an adequate remedy at law, if, after paying the tax, he can sue the State or the officers who collected the tax, to recover it back.

And his remedy at law is also adequate in the case of a personal tax, if the State can only collect the tax by suit, or other proceeding that will afford the citizen an opportunity to contest its validity without incurring penalties or forfeitures in the meantime.

We have not been cited to any statute or decision of the Supreme Court of the State, showing that if the plaintiff paid the tax the suit would lie against the State or her officer to re-

cover it back. In the view taken by the Court of the other points in the case, the decision of this question, one way or the other, would not change the result; the Court will therefore assume for the purpose of this case, that by the laws of Missouri, an action could not be maintained to recover back a tax like this.

The act we are now considering does not contemplate a suit to collect a tax. The amount of the tax cannot be known until the company makes a return of its earning; and the making of this return and the payment of the tax are, by the provisions of the act, enforced by the imposition of a penalty of one hundred dollars per day and the denial of the right to do business in the State so long as the company is delinquent.

While it is true that the plaintiff might contest the validity of the act in any suit brought by the State to collect the penalty imposed for the non-payment of the tax, that would not be an adequate remedy; for the reason, that during the pendency of such a suit, the penalty of one hundred dollars would be accruing each day, and the plaintiff be denied the right to carry on its business in the State.

It would take months, and possibly years, to reach a final decision of the case, and, if that decision should be favorable to the State, the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of one hundred dollars per day for the whole period, and the destruction of its business in the State, and probably great injury to its business in other States. Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law, will be or may be, attended by the imposition of heavy penalties and forfeitures. And upon this ground, and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case.

Multiplicity of suits having also been earnestly urged upon the Court as a ground of jurisdiction in the case, it is proper to consider that question.

It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each day's penalty, the Court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator and the Court will not impute to it, or to its officers acting for and in its name, a litigous and vindictive spirit, or a purpose needlessly to vex and harrass the citizen with law suits.

Whatever the rule may be in the case of natural persons, the Court will presume that a State is incapable of such a vulgar passion, and until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than fairly necessary to establish and maintain its rights.

The disposition of the case, on its merits, depends on the construction of the statute imposing the tax. The first question is, does the tax imposed by the act, upon the express company's receipts, amount to a regulation of, or an interference with Inter-State commerce? The tax is imposed on the receipts for "all sums earned or charged for the business done within the State." The words qualify the whole act. They are plain and unambiguous.

The words "for the business done within the State" *ex vitermini* import business begun and ended in the State, and include only in the tax intrastate and not interstate commerce. The interjection of the intensifying words "wholly" or "entirely" would not alter their meaning or change their legal effect.

Interstate commerce is not "business done within" the State of Missouri; it is business done between two or more States. A package carried by the plaintiff from Omaha to St. Louis, is not business done within the State of Nebraska or the State of Missouri, but it is business done between those two States.

A contract for the carriage of goods from one State to another is an entire contract, and is an interstate contract, and the carriage of the goods under such a contract is interstate commerce, and is not "business done within" any one of the States from, through and to which they are carried, on such contract,

Before the passage of this act the Supreme Court of the United States had decided, in several cases, that it was not competent for a State to levy a tax upon earnings derived from interstate commerce.

W. U. Tel. Co. vs. Alabama, 132 U. S., 472.

Leloup vs. Port, of Mobile, 127 U. S., 640, and cases there cited.

Ratterman vs. Western Union Tel. Co., 127 U. S., 411.

Lyng vs. State of Michigan, 135 U. S., 161.

The law as contained in these decisions, was common knowledge before the passage of this act, and it is obvious that the General Assembly had these decisions in view in drafting the act. The limitation of the tax to the receipts on business done within the State is explicit, and is three times repeated. The Legislative intent not to impinge on interstate commerce is manifest.

But if the meaning of the act was doubtful the doubt must be resolved in favor of its validity. It is a canon of construction that when an act of the Legislature admits of two interpretations, one of which brings it within and the other presses

it beyond, their constitutional authority, the Court will adopt the former construction.

But if the act could be construed to embrace the earnings derived from interstate commerce, that would not render the whole act invalid. It would still be valid as to the earnings derived from interstate commerce, and the plaintiff would have to pay the tax on the receipts of its business done within the State.

Ratterman vs. W. U. Tel. Co., 127 U. S., 411.
W. U. Tel, Co. vs. Alabama, 132 U. S., 472.

The next contention is, that the act deprives the plaintiff of the equal protection of the laws secured to it by the Fourteenth Amendment to the Constitution of the United States, and violates the rule of uniformity and equality of taxation required by that article and the Constitution of the State of Missouri.

This contention is rested on the words of the act that limits its operation to express companies that carry "by express, on contract with any railroad or a steamboat company."

Neither the Constitution of the United States, nor of the State of Missouri, requires taxes to be levied by a uniform rule upon all descriptions of property; or that all taxes on franchise, licenses and privileges should be equal or imposed by a uniform rule. For purposes of taxation, property and franchises, licenses and privileges, may be classified and the different classes valued or taxed by different methods.

The pursuits of mankind have become so varied, and property has assumed so many forms, many of them artificial and complicated, that different classifications of property for purposes of taxation, and the valuation of different classes by different methods, are rendered imperatively necessary. And franchises, licenses, and privileges may be classified according to their several natures, and each class taxed a different rate

and by a different method, or some may be taxed and others not.

There is no evasion of the requirement of equality or uniformity so long as all in the same class are subject to the same tax under the same conditions. These principles have been repeatedly affirmed by the Supreme Court of the United States. In the latest utterances of that Court on this subject, it is said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, except certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. * * * * We think we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."

Bell's Gap Rrailroad Company vs. Pennsylvania, 134 U. S., 232, p. 237.

"But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint-stock companies and associa-

tions of the same kind are subjected to the same tax. There is the same rule applicable to all under the same condition in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See Barbier vs. Connolly, 113 U. S., 29-32; Soon Hing vs. Crowley, 113 U. S., 703-709; Missouri Pacific Railway vs. Humes, 115 U. S., 512-523; Missouri Pacific Railway vs. Mackey, 127 U. S., 205-209; Minneapolis Railway Co. vs. Beckwith, 129 U. S., 26-32."

Home Insurance Co. vs. New York State, 134 U. S., 594, pp. 606-607.

In the light of the doctrine of these cases it is plain the act we are considering is not in contravention of the Fourteenth Amendment.

The act imposes the same tax on all express companies in the same circumstances and conditions.

It is not averred in the bill and was not contended in argument that any person, company or corporation engaged exclusively in the express business owns and operates its own railroads and steamboats for the exclusive purpose of carrying its express messengers and freights. There are no such express companies..

In the matter of the express companies, inter-state commission, report 340, p. 367, the question was presented to the commission whether express companies were within the provisions of the inter-state commerce act,

In enumerating the reasons set up by the express companies against the claim that they were within the act the commission say:

"The words 'its railroad,' the express companies say, exclude the idea that they are intended by the law, for they have no railroads; they neither own nor operate any railroad lines."

And the commission concurred in this view.

The act of the Legislature of Missouri applies to express

companies proper, and contains a brief and—as far as it goes—accurate definition of them. From the origin of express companies down to the present time a distinguishing and uniform feature of their method of conducting business has been the hiring of railroad and water transportation for the messengers and freight. It is a common carrier that does not own any means of transportation, but hires other common carriers, railroad and steamboat companies, to carry its freight and messengers.

It may be defined to be a common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages which cannot be conveniently or safely carried as common freight, and also other articles and packages of any description which the shipper desires, or the nature of the article requires, should have safe and rapid transit and quick delivery, transporting the same in the immediate charge and custody of its own messenger, on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights, and within cities and towns or other defined limits it collects from the consignors and delivers to the consignees at their places of business the goods that it carries.

Express cases, 117, U. S., 1.
Retzer vs. Wood, 109, U. S., 185.
Inter-state Com. Rep., p. 273.
In the matter of the express companies, Inter-state Commerce Rep., 349.

The Court is bound to take judicial notice of a matter of public history and facts notorious to persons of ordinary intelligence. It would be discrediting to the Court to affect to believe that there was any person in Missouri conducting an express business without the use of railroad or steamboat

transportation. The freighting business of this country was once carried on in wagons, propelled by animal power on dirt roads, but that method of transporting common freights has been rendered obsolete by the railroads and steamboats. Such a thing as an express company disassociated from transportation by rail or steamer is unknown.

In the case of Hoey, suing as a shareholder in the Adams Express Company, against these same defendants, submitted for decision with this case and depending on the same questions, the bill alleges that the Adams Express Company, in conducting its business, "utilizes over nineteen thousand miles of interstate railway communication."

It is true, there are in cities and towns persons and corporations that carry goods and parcels in wagons or carts from one place in the city or town and its vicinity to another, as chance may offer. But that is not an express business. A statute of the United States provided "that any person, firm, company, or corporation carying or doing an express business, shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business."

Under this statute the collector of internal revenue required one Ritzer to pay a tax for carrying on an "express business." Ritzer's business was the carrying of goods, freight and baggage in wagons between New York and Brooklyn and from one place in Brooklyn to another place in the same city.

He did not run regular trips, nor over regular routes, but when and where he had orders. Upon these facts the Supreme Court of the United States held that Ritzer was not carrying on an "express business."

The Court said:

"We are of the opinion that the plaintiff was not liable to this tax, because he did not carry on or do an 'express business' within the meaning of the statute. Although he carried goods between New York and Brooklyn, and from

one place to another in eitheir city, he did so solely on call and at special request. He did not run regular routes or ferries. He was no more than a drayman or truckman doing a job when ordered. The fact that he had a place in Brooklyn where orders could be left on a slate made no difference. The words 'express business' in the statute must have the meaning given them in the common acceptation. An 'express business' involves the idea of regularity as to route or time or both, such is the definitions in the lexicons."

Retzer v. Wood 109 U. S. 185, p. 187.

But suppose a business like Ritzer's could be called an express business, it differs so essentially in methods and conditions, from the business defined by the act we are considering, that it is obvious that they may be differently classed for taxation and that the rule of equalty and uniformity would not be violated by varying either the rate or the method of taxing them.

The Legislature might well consider a tax on the teams and wagons sufficient in the one case, and a tax on the earnings necessary in the other, or it might exempt the one and tax the other, without impinging on the Fourteenth Amendment.

See Gibson Co., v. Pullman South. Car Co., 42 Fed. Rep., 572, p. 574.

The express business taxed by this act differs so materially from that conducted by other common carriers, and is so clearly defined and understood to be a distinct and separate branch of business, that it was eminently proper, if not imparatively necessary—if it was to be taxed at all—for the Legislature to class it by itself, and having so classed it, it was competent for the Legislature to impose such a tax on its earnings, for business done within the State, as its wisdom dictated, not in excessof any limit prescribed by the Constitution of the State.

In the first annual report of the Inter State Commerce Commission, 1887, p 13, it is said:

"Some of the railroad companies, however have undertaken to do the express business on their own lines, through

their own agencies. The Baltimore & Ohio Railroad Company did this for a time, and then sold the business to one of the existing Express Companies. Some of the Western railroads combine for the purpose, and for convenience create a nominal corporation to do the business over their several lines and divide the net proceeds. * * * * There is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation."

When a railroad company, by the addition of a new bureau or department and the adoption of new methods in the conduct of its business, qualifies itself to do the business commonly done by an express company, it does not thereby, itself, become an express company. Such an expansion or extension of its business as a common carrier, works no change in its corporate character. Nor does it escape taxation on such new business. All schemes for the taxation of railroads, however much they may vary in details, are intended to include and do include in one way or another, a tax on all their property, income and franchises. If the tax is not in terms laid upon their business and income, due regard to these is had, in imposing the tax on their property and franchises.

It may be conceded that three are no means of ascertaining whether a railroad company pays more or less tax on the earnings derived from its express business than is paid by an express company; but if it is admitted to be less, that is not the want of equality that falls under the ban of the constitution; but it results from the difference in the constitution, methods and business pursuits of the two corporations, which justifies the Legislature in classifying them differently for purposes of taxation, and taxing them by different methods.

What is true of one railroad company is true of any association of railroad companies. All business they do as railroad companies is taxed in the general scheme for the taxation of railroads.

It is not alleged in the bill in this case, that the persons

and corporations, which it is averred are carrying goods "by freight and express" are not taxed. The complaint is that they are taxed at a different rate, and by a different method from that applied to the plaintiff and all others who carry freight "by express on contract with any railroad or steamboat company."

The plaintiff's contention is, that those carriers who own their transportation and are common carriers of all manner of freights, shall be taxed at the same rate and by the same method as those carriers who hire their transportation and whose business is limited to the carriage of express matter; in a word, that, for purposes of taxation, railway companies shall be classed with express companies and taxed at the same rate and by the same rule.

There are inherent and fundamental differences in the corporate franchises, rights and duties, property and methods of business of a railroad company and an express company. These differences forbid their being classed together for purposes of taxation. Such a classification would be extremely incongruous. Because of this difference between the railroad companies and the express companies the latter could not be brought within the purview of the Interstate Commerce Act.

Case of the Express Companies, 1 Inter. St, Com. Rep., 349.

United States vs. Morsman, 43 Fed. Rep., 448.

Except as to their visible and tangible property, there seems to have been no law for taxing express companies until the passage of this act; for the Legislature in the third section of the act assigns as a reason for putting the action in force from its passage, the fact of "there being no law in this State by which said companies are taxed."

Will any one seriously contend that before the passage of this act railroad companies could have successfully resisted the payment of taxes because express companies were not taxed? Or that they can now do so because the method of taxation is different?

If the rule contended for by the plaintiff is sound, it must be reciprocal, and, if express companies are not liable for the tax because they are not classified for taxation with railroad companies and taxed in the same manner, then the railroad companies can object to paying taxes because they are not classified with express companies and taxed by the same method. For purposes of taxation they have no relation to each other and the method of taxing them may be as widely different as the Legislature in its wisdom chooses to make it.

The demurrer to the bill is sustained, the temporary injunction dissolved and the bill dismissed for want of equity.

DECREE.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

THE PACIFC EXPRESS COMPANY,

vs.

J. M. SEIBERT, State Auditor, et al.

This cause having been argued on a previous day of the term by W. W. Morsman, Esq., solicitor for the plaintiff, and John M. Wood, Attorney-General for the State, solicitor for the defendants. and the Court being now well advised in the premises, it is ordered, adjudged and decreed that the demurrer to the bill be sustained, the temporary injunction heretofore granted dissolved, and the bill of complaint dismissed for want of equity, and that the plaintiff pay all the costs of this suit.

Whereupon the said plaintiff by its said solicitor prayed an appeal from this decree to the Supreme Court of the United States, which prayer of appeal is allowed and said appeal granted.

If the plaintiff desires to supersede the decree for

the costs in this cause, pending the appeal from said decree, it may do so upon filing a bond to be approved by the Clerk in the sum of two hundred and fifty dollars; but the decree dissolving the temporory injunction shall not be superseded, stayed or modified in any respect.

[Signed] HENRY C. CALDWELL, Circuit Judge.

1558

IN THE SUPREME COURT

OF THE UNITED STATES.

THE PACIFIC EXPRESS COMPANY,
Appellant,
vs.
JAMES M. SEIBERT,
State Auditor of Missouri,
AND
JOHN M. WOOD,
Attorney-General of Missouri.
} IN EQUITY

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

MOTION TO ADVANCE CAUSE.

WESTEL W. MORSMAN,
Of Counsel, for the Motion.

REED, MILLER & RICHARDSON, PRINTERS, OMAHA.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE PACIFIC EXPRESS COMPANY,
Appellant,
vs.
JAMES M. SEIBERT, STATE AUDITOR,
et al., Appellees.
} IN EQUITY

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

THE MOTION OF THE PACIFIC EXPRESS COMPANY FOR AN ORDER ADVANCING THE CAUSE TO A HEARING ON THE MERITS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Pacific Express Company, complainant and appellant in the above entitled cause, now moves the Court to advance the same upon the docket, and set the same down for hearing on the merits, upon some early day certain to be fixed by the Court, and appellant now avers:

1. That the bill herein, a copy of which is printed and filed herewith, seeks to restrain the defendants, the State Auditor and the Attorney-General of Missouri, from executing an act of the legislature of the State of Missouri (also printed herewith) entitled, "AN ACT to define express companies, and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon," upon the ground that said act is in violation of the Fourteenth Amendment to the Constitution of the United States, in that the said act denies to appellant the equal protection of the laws of said state.

2. The bill avers that said act of the legislature of the state of Missouri imposes a tax upon the gross receipts from transportation of all persons and corporations engaged in the business of carrying packages and goods by express within said state, "*on contract with any railroad or steamboat company.*"

3. That appellant was at the time of the passage of said act, and ever since has been, engaged in carrying packages and goods by express within said state, and "on contract" with various railroad companies, and was and is subject to the provisions of said act; whereas other persons and corporations engaged, or who may engage in and pursue the same business, in the same manner, within the state, but not "on contract" with any railroad or steamboat company, are by the said act exempted from the payment of the tax thereby imposed. The chief contention of appellant (which was denied by the Court below) being that, under the Fourteenth Amendment to the Constitution of the United States, it is not competent for a state to impose a tax upon the occupation of carrying by express, or, what is the

same thing, upon the gross receipts from such occupation, when carried on by persons or corporations who hire ("on contract") their transportation facilities, without imposing the same tax upon the same occupation, or the gross receipts therefrom, if carried on by persons or corporations who own their own lines of transportation, the effect of such an imposition being to deny to appellant the equal protection of the laws of the state.

And as "special and peculiar circumstances" constituting reasons for advancing the cause, appellant further avers:

1. That, by the terms of said act of the legislature of Missouri, it is provided that, for each and every day that any person or corporation subject to its provisions, shall neglect to report his or its gross receipts and pay to the State Treasurer of said state the tax imposed, after the 30th day of June in each year, such person or corporation so failing shall forfeit the sum of one hundred dollars and be prohibited from carrying on its business within the state until such tax is paid.

2. That since the appeal was taken to this Court, to-wit: on the 28th day of November, 1890, appellant paid to the State Treasurer of the State of Missouri the amount of the tax demanded for the year ending June 30th, 1890, to-wit: the sum of three thousand one hundred and forty-three and eighty-four one-hundredths ($3,143.84) dollars. But appellant avers that such payment was involuntary, and made under fear, compulsion and coercion, and to avoid the great risk of the penalties and forfeitures provided by the act, and to prevent the further accumulation of such

forfeitures, and such payment was made only after the following protest, to wit:

JEFFERSON CITY, Mo., Nov. 28th, 1890.

To Lon V. Stevens, State Treasurer of the State of Missouri:

Please take notice that the Pacific Express Company, in paying the sum of thirty-one hundred and forty-three and eighty-four one-hundredths dollars under the act of the legislature of the State of Missouri, entitled, "An act to define express companies, and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon, approved May 16th, 1889, now protests that the said act is an unconstitutional and void act, and that said sum is not legally or justly due the State of Missouri; that the said Pacific Express Company pays the sum involuntarily and denying the right of the state to the same; that the said Pacific Express Company being unable to foresee the result of litigation now pays said sum of money under fear, compulsion and coercion of the severe penalties prescribed by said act.

THE PACIFIC EXPRESS COMPANY,

By W. W. Morsman, its Attorney.

3. Appellant further avers that the State of Missouri does not permit itself to be sued, and appellant has no legal remedy to recover back from the State of Missouri, or from the State Treasurer, the sum paid as aforesaid, or to recover back any sum that may be hereafter paid under compulsion of the penalties of the act aforesaid; and as appellant is advised and believes and now avers, two, and probably three, annual installments of tax under said act will mature and be demanded from appellant before, in the ordinary course of the business of this Court, this cause can be reached for hearing on its merits, and appellant will be compelled to pay the same in order to avoid the risk of incurring the penalties and forfeitures of the act, and appellant will thereby be denied its rights

under the Constitution of the United States, unless this cause is advanced to an early hearing.

Wherefore, because of the special and peculiar circumstances aforesaid, appellant now prays the Court to advance the said cause to an early hearing.

WESTEL W. MORSMAN.

Counsel for the Appellant.

(Verified copy filed with clerk).

EXHIBIT "A."

AN ACT to define express companies, and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon.

SECTION 1. Any person, persons, joint-stock association, company or corporation incorporated under the laws of any state, territory or country, conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise or effects of any kind by express, on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this state), shall be deemed an express company.

SEC. 2. Every such express company shall annually, between the first day of April and the first day of May, make and deliver to the State Auditor a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this state of each agent of such company doing business in this state for the year next preceding the first day of April, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies; *Provided*, that the amount which any express company actually pays to the railroads or steamboats within this state for the transportation of their freight within this state may be deducted from the gross receipts of such company as above ascertained; and, provided further, that said amount paid to the various railroad or steamboat companies for transportation shall be itemized, showing the amount paid to each railroad or steamboat company; and, provided further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or

charged for the business done within this state for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county and the total amount received in all the counties. In case of the failure or refusal of such express company to make such statement before the first day of May, it shall then be the duty of each local agent of such express company within this state, annually, between the first day of May and the first day of June, to make out and forward to the State Auditor a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of April. When such statement is made such express company shall, at the time of making the same, pay into the treasury of the state the sum of two dollars on each one hundred dollars of such receipts; and any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided, and to pay the required tax thereon, shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the State of Missouri, on the relation of the State Auditor, in any Court of competent jurisdiction, and the Attorney-General shall conduct such prosecution; and such company, corporation or association so failing or refusing shall be prohibited from carrying on said business in this state until such payment is made.

SEC. 3. There being no law in this state by which such express companies are taxed, creates an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage.

Approved May 16th, 1889.

BILL OF COMPLAINT.

Your orator, the Pacific Express Company, respectfully represents:

First—That it is a corporation organized under, and created by, the laws of the State of Nebraska, and for the purpose of the jurisdiction of this Court, a citizen of said State of Nebraska; and the defendant, J. M. Seibert, is the State Auditor of the State of Missouri, and the defendant, John M. Wood, is the Attorney-General of the State of Missouri, each of said defendants being a citizen of said State of Missouri, and residing at the city of Jefferson, in said last named state; and that the matter in dispute in this suit exceeds the sum of two thousand dollars exclusive of interest and costs.

Second—That on the 16th day of May, 1889, your orator was, and all of the time since has been, and now is, engaged in the business of conveying money, packages gold, silver, plate, articles, goods and merchandise, to, from and through the State of Missouri and various parts of said state by express; and that in the prosecution of its said business your orator did not, at the time aforesaid, have or provide its own transportation, but carried on its said business and conveyed the descriptions of property aforesaid within the said State of Missouri over the railroad of, and on contract with, the Missouri Pacific Railroad Company and various other railroad companies whose lines of road are, and have been, operated within said state.

Third—That in the prosecution of its said business your orator did, at the time and during the period aforesaid, and now does, receive property of

the descriptions aforesaid, at numerous points or towns within the States of Nebraska, Kansas, Texas, Colorado and many other States of the United States, and convey the same for its patrons, for hire, from such points, to the various points or towns within the said State of Missouri; and your orator did, and does now, receive property of the descriptions aforesaid at various points or towns within the State of Missouri and convey the same, for hire, for its patrons, to numerous points or towns within the States of Nebraska, Kansas, Texas, Colorado and many other States of the United States; and your orator did, and does now, receive property of the descriptions aforesaid at various points or towns within the said State of Missouri and convey the same for hire, for its patrons, to numerous other points or towns within the said State of Missouri, delivering said property at destination to the person or persons there to whom the same is consigned.

Fourth—*That at the time and during the period aforesaid, there were, and there are now, other persons, co-partnerships, associations and corporations residing and doing business within the State of Missouri, who were engaged in conveying to, from and through the said state and various parts of the same goods and property of the descriptions aforesaid, for hire, by freight and by express, but not "on contract" with any railroad or steamboat company, or the managers, lessees, agents or receivers thereof, within said state: such persons, co-partnerships, associations and corporations being either provided with their own transportation facilities, or procuring the same by hire from other persons, not a railroad or steamboat company, or the manager, lessee, agent or receiver thereof.*

Fifth—That on said first-named date the General Assembly of the State of Missouri passed an act, entitled "An act to define express companies and to pre-cribe the mode of taxing the same, and to fix the rate of taxation thereon," and which said act took effect on the 19th day of May, 1889, whereby it was enacted, that:

Any person, persons, joint stock association, company, or corporation * * * * conveying to, from or through the State of Missouri, or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise or effects of any kind, by express, *on contract* with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof, but not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in said state, should be deemed an express company.

And by another section of the same act it was also enacted that:

Every such express company should make an annual report under oath to the state Auditor of said state, showing the entire receipts for business done within said state, of each agent of such express company doing business within the state for the year next preceding the first day of April in each year, including therein such company's proportion of gross receipts for business done by such company with other companies.

And by the said section it was further provided that:

The report of such company should contain an abstract of the amount received in each county, and the total amount received for all the counties of the state; and that, in case of failure or refusal of such express company to make such report on or before the first day of May, it should then be the duty of each local agent within the state to make such report of the gross receipts of his agency on or before the first day of June.

And by the said act it was further provided that:

When such statement should be made, and after deducting from the gross receipts shown thereby, the amounts actually paid by such express company to the railroads or steamboats within the said state for the transportation of freight for such express company within said state, such express company should pay into the treasury of the state the sum of two dollars on each one hundred dollars of such receipts.

And by said act it was further provided that:

Nothing contained in the said act shall release any such express company from the assessment and taxation of its tangible property in the manner that other tangible property is assessed and taxed in said state.

And by said act it is further provided that:

If any such express company shall fail for more than thirty days after the first day of June in each year to make to the State Auditor the reports aforesaid, and to pay the required tax thereon, then such express company shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the State of Missouri on the relation of the State Auditor, and that such action shall be prosecuted by the Attorney-General of the state, and that such express company shall be prohibited from carrying on said business in the state of Missouri until such payment is made.

A copy of the act of the General Assembly of the State of Missouri above referred to is hereunto annexed and made part hereof, for convenient reference, and marked "A."

Sixth—Your orator further avers that if the act aforesaid of the General Assembly of the State of Missouri is a valid law, your orator would be required to pay into the State Treasury for the year ending April 1st, 1890, the sum of

dollars; and if the said act be

a valid law only in respect to gross receipts upon such business as your orator has done as aforesaid between points wholly within the State of Missouri, and void as to the gross receipts upon such business as your orator has itself, or in connection with other carriers, done between points within the State of Missouri and points in other states, then your orator would be required to pay the sum of three thousand one hundred and forty-three dollars and eighty-four cents, for the period aforesaid.

Your orator avers that it does not seek to escape any just burden of taxation legally imposed upon it, and that if it shall be adjudged that said act is a valid law, or valid to the extent of gross receipts upon the transportation business done by your orator originating and terminating wholly within the State of Missouri, your orator is ready and willing and will promptly pay the sum imposed upon it, as required by the terms of said act.

Seventh—But your orator avers that the said act of the General Assembly of the State of Missouri is not a valid law, and is not binding upon your orator. That a large proportion of the gross receipts of your orator, upon business done within the said State of Missouri, is for transportation charges upon property of the descriptions contained in said act, being carried by your orator, or by your orator and its connecting lines, from points or towns outside the State of Missouri to points or towns within said State of Missouri and from points or towns within said State of Missouri, to points or towns situated in other states. That such transportation is commerce between different states, and the tax imposed by said act is a tax upon such commerce; and so far, your orator avers,

the said act is in violation of that provision of the Constitution of the United States which vests in the Congress of the United States the exclusive right to regulate commerce among the several states.

Eighth—*Your orator further avers that neither the said tax of two per cent. nor any equivalent tax is imposed by the said act, or by any law of the State of Missouri, upon other common carriers of goods; or upon persons, associations or corporations engaged, or who may engage, in conveying property and goods of the descriptions contained in said act by express, or upon the business or gross receipts of such common carriers, persons, associations and corporations, who do not hire transportation by "contract with any railroad or steamboat company, or the managers, lessees, agents, or receivers thereof;"* and your orator further avers that, by the law of the State of Missouri, it was at the date of the passage of the act herein before mentioned, and has ever since been, provided in respect to all other ad valorem and per centum taxes; that the assessment of persons, property and business for the purpose of such taxation should be equalized between persons, associations and corporations responsible for the payment of such tax by a County Board of Equalization with the right of appeal from the assessment to such board; and that such assessments should be equalized as between the several counties of the state by the State Board of Equalization; whereas, by the act aforesaid, no provision is made for the equalization of the tax therein provided for, either by the County Boards of Equalization or said State Board, nor any right of appeal, nor is any such equalization or right of appeal provided for by any other law of the State of Missouri. Your orator therefore avers

that said act denies to it the equal protection of the laws of the State of Missouri, in violation of that provision of the Fourteenth Amendment to the Constitution of the United States, which prohibits any state to deny to any person within its jurisdiction the equal protection of the laws; and said tax, imposed by said act, not being imposed upon all of the persons, associations, corporations, property or business of the class to which it applies and to which your orator, its business and its property belong, the tax so imposed is wanting in uniformity, and in violation of section three (3) of article ten (10) of the Constitution of the State of Missouri, by which it is provided that taxes "shall be uniform upon the same class of subjects within territorial limits of the authority levying the tax."

Ninth—Your orator further avers that it is provided by section four (4) of article ten (10) of the Constitution of the State of Missouri that "all property subject to taxation shall be taxed in proportion to its value;" and by section eight (8) of the same article, that "the state tax upon property shall not exceed twenty cents on the hundred dollars valuation." That the said tax not being based upon value, nor levied by any rule of proportion, nor subject to any limit, other than the volume of business of the express companies subjected to it, the said act is in violation of the aforesaid provisions of the Constitution of the State of Missouri.

Tenth—Your orator further avers that the defendant herein, notwithstanding the facts herein before set forth, claim and give out that the said act of the State of Missouri is a valid law, and that your orator is under legal obligation and duty to make the

annual report and pay the tax provided for in said act; and that they, the said defendants, being the officials charged by the terms of said act with the duty of enforcing its provisions, are under an official duty and obligation to demand compliance by your orator with the provision of said act, and to coerce such compliance by proceeding to enforce the penalties therein provided for. That unless restrained by the orders and process of this Court from so doing the said defendants will proceed as if to enforce the same, by instituting legal proceedings for the collection of the penalties therein prescribed, and to prohibit your orator from carrying on its said business within the State of Missouri, whereby your orator will be subjected to, and harassed by, a multiplicity of suits and suffer irreparable loss and injury for which it has no adequate remedy at law.

Wherefore, your orator, to the end that it may be justly and equitably relieved, now prays the Court to grant its process by subpoena directed to the said J. M. Seibert, State Auditor of the State of Missouri, and said John M. Wood, Attorney-General of the State of Missouri, the defendants herein before named, commanding them, and each of them, to appear herein and answer your orator's said Bill of Complaint, but not under oath, an answer under oath being hereby expressly waived. And your orator further prays that the said act of the General Assembly of the State of Missouri be adjudged to be unconstitutional and void, and that an injunction be granted to your orator restraining and enjoining the said defendants, and each of them, from in any manner proceeding to enforce the said act, or any penalty therein provided for, against your orator, pending the trial of

this cause and until the further order and decree of the Court, and that the said injunction be finally made and decreed to be perpetual, and for such other and further relief in this behalf as may be equitable and just.

IN THE SUPREME COURT

OF THE UNITED STATES.

THE PACIFIC EXPRESS COMPANY,
Appellant,

vs.

JAMES M. SEIBERT,
State Auditor of Missouri,

AND

JOHN M. WOOD,
Attorney-General of Missouri.
Appellees,

} IN EQUITY

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF ON MOTION TO ADVANCE CAUSE.

WESTEL W. MORSMAN,
Counsel for the Motion.

WEBB, MILLER & RICHARDSON, PRINTERS, OMAHA.

this cause and until the further order and decree of the Court, and that the said injunction be finally made and decreed to be perpetual, and for such other and further relief in this behalf as may be equitable and just.

IN THE SUPREME COURT

OF THE UNITED STATES.

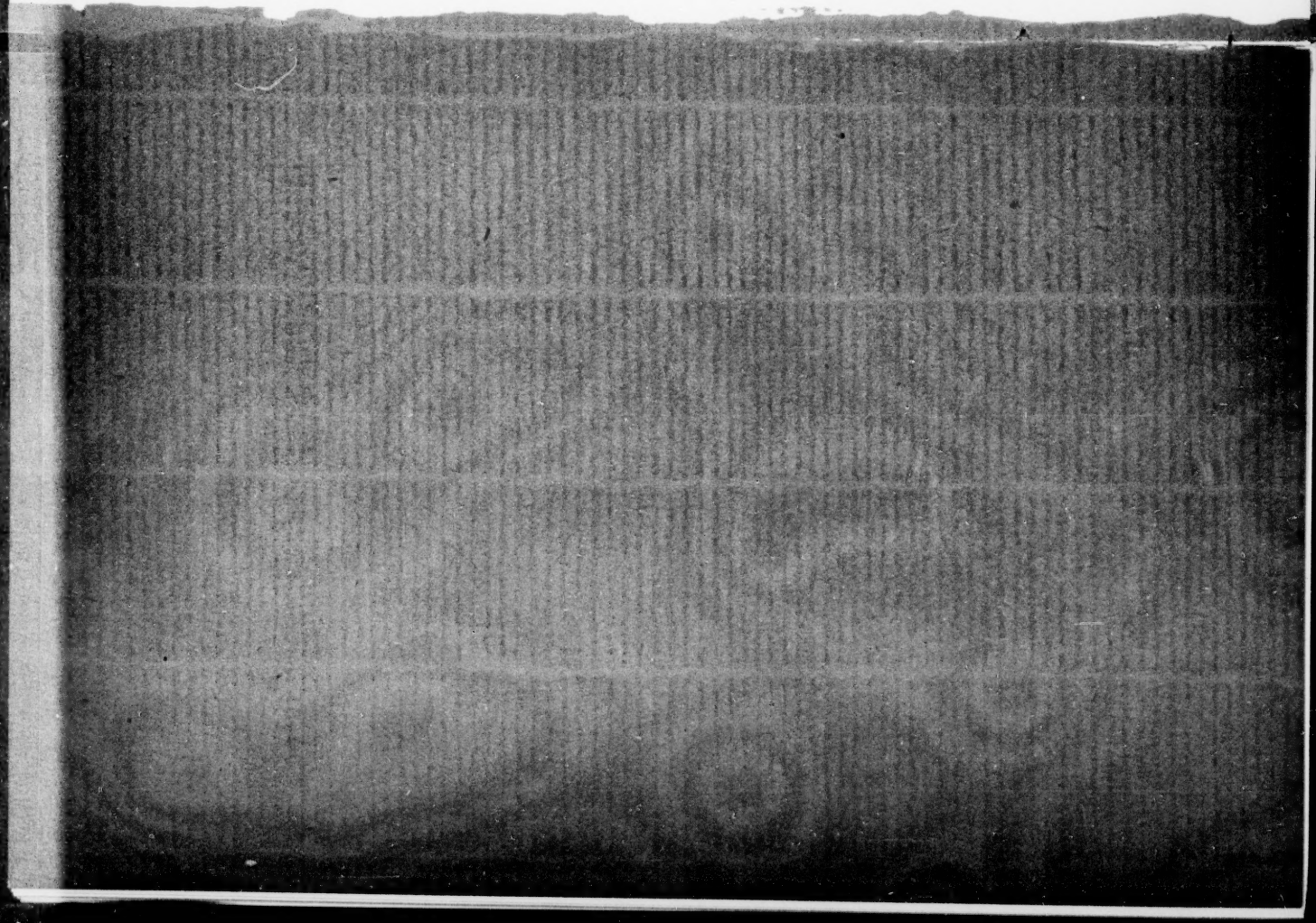
THE PACIFIC EXPRESS COMPANY,
Appellant,
vs.
JAMES M. SEIBERT,
State Auditor of Missouri,
AND
JOHN M. WOOD,
Attorney-General of Missouri.
Appellees.
} IN EQUITY

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF ON MOTION TO ADVANCE CAUSE.

WESTEL W. MORSMAN,
Counsel for the Motion.

GIBSON, MILLER & RICHARDSON, PRINTERS, OMAHA.



In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE PACIFIC EXPRESS COMPANY,
Appellant,
vs.
JAMES M. SEIBERT, STATE AUDITOR,
et al., Appellees.
IN EQUITY

BRIEF IN SUPPORT OF APPELLANT'S MOTION TO ADVANCE THE CAUSE.

The motion in this case is urged upon the Court, under sub-division seven (7) of rule twenty-six (26), the facts presenting a case of "special and peculiar circumstances" in the sense of that rule.

It may be conceded that a threatened pecuniary loss, which is purely incidental to delay, would not bring a case within the rule. In such cases the *right* which is in litigation is preserved, and finally adjudicated. The incidental loss is usually compensated by interest or damages, which, though it may often be inadequate in fact, is legal compensation.

The facts in the case at Bar involve the loss of the right in litigation, and leave the complainant remediless. There is not a merely inadequate or incom-

plete remedy--there is no remedy at all. No suit can be maintained against the State Treasurer, for he did not demand the tax, and had no power to coerce payment or enforce the act. So far as he is concerned the payment is voluntary. The State coerces (if appellant's contention is sound) the payment of money in violation of a right secured to appellant by the Constitution of the United States; and the State not being subject to be sued, the appellant can never be restored to its right under the Constitution by any Court. It is clear oppression for which there is no complete remedy, but the certain repetition of which may be prevented by advancing the cause to an early hearing in this Court.

The people of the United States have been so solicitous to preserve the integrity of rights guaranteed by the Constitution of the United States, that Congress has given this Court jurisdiction to review the judgments and decrees of subordinate courts involving such rights without regard to the value of the matter in dispute. Should not this Court, in the exercise of its jurisdiction to preserve such rights and prevent their denial, be equally solicitous to see that the right is not effectually denied while its powers are being invoked?

It is not the mere fact that money will be demanded from appellant before the cause can be reached in the ordinary course of business of this Court, that prompts this motion, but the fact that appellant will be *compelled* to pay, *involuntarily*, and that it will then be *without remedy*, whereby appellant's constitutional right will be effectually denied by the State. This, it seems, makes a clear case of "special and peculiar circumstances," within the rule of this Court.

Of what value is the constitutional guaranty of equal legislation, if the State may deny it during a period of three or four years? The right may be completely destroyed in that time. Take this case as an illustration and suppose it to have been the purpose of the State to drive out of the business all persons who hire transportation facilities, in order that the same business should be done by those who own the lines of transportation, it would only have been necessary to make the tax sufficiently burdensome.

Of course, the State had no such purpose, but there is no reason to doubt that in prescribing the penalties for delay in paying the tax, it was the purpose of the Legislature to effectually coerce submission to the tax and deny the right to appeal to the courts against the validity of the Act. There could have been no other motive for prescribing such unusual and disproportionate penalties for delay. The thought was that judicial investigation of the validity of the Act would be forestalled and prevented by making the penalties so destructive, that persons embraced within the Act would submit to its exactions, rather than seek relief in the courts at the hazard, in case of defeat, of being finally subjected to penalties that would be practically ruinous. The scheme has been successful so far, but it is none the less unjustifiable and oppressive.

A payment of the tax imposed by this Act, in order to avoid the risk of the penalties prescribed for delay, is an involuntary payment. It is true that the Act does not authorize the defendant to seize property; and, theoretically, the appellant can defend in a suit to enforce the penalties. But the results of litigation can not be foreseen with certainty. We

may confidently think we know what the law is, but we are often then most mistaken. The courts some times err, and defeat often proceeds from the oversight or inadvertance of counsel. The result is always subject to the doubt and uncertainty that beset the efforts of human tribunals and devices. The penalties prescribed by this Act are so enormous that no prudent person would allow them to go on accumulating indefinitely while he sought an adjudication of his rights, subjecting himself to ruin if he has mistaken his rights, or if by some oversight or inadvertance of his counsel or error of the Court, he is finally defeated. These penalties are as coercive as a power to seize and sell property, or a power to imprison a person. Indeed they are more so, for resort may be had to the courts for recovery of property or the restoration of the person to liberty, without incurring a constantly and enormously increasing hazard. It is difficult to conceive of a device more completely coercive. It leaves the subject no reasonable or practicable alternative, but coerces submission to the mere arbitrary will of the Legislature.

The payment of an illegal demand to an officer, armed with authority to enforce it by arrest, or seizure and sale of property, and who is about to execute his authority, has always been regarded as an involuntary payment. But these facts no more constitute duress than do the facts in the case at Bar. The act of the Legislature itself coerces payment.

In State vs. Nelson, 41 Minn., 25, where by force of the statute a party could not have his deed for land recorded until certain taxes were paid, payment was held to be involuntary. The Court said:

"Nor is it necessary, in order to constitute a com-

pulsory, as distinguished from a voluntary payment, that the unlawful demand be made by an officer who is prepared to enforce it by process. There may be that kind and degree of necessity or coercion which justifies and virtually requires payment to be made of the illegal demands of a private person who has it in his power to seriously prejudice the property rights of another, and to impose upon the latter the risk of great loss if the demand be not complied with."

And also:

"Indeed men of ordinary prudence would not generally hesitate to pay a demand such as involved in this tax, rather than to incur the risk of losing their entire estates, by not placing their deeds upon record. Both upon the ground of reason and of authority, such a payment, made under protest, should not be regarded as voluntarily made. The parties interested do not stand upon equal terms. The law in effect compels the payment."

And in Marshall vs. Sneidiker, 25 Tex., 460, where an ordinance imposed a penalty of twenty-five dollars per day for the non-payment of a license fee for selling liquor, payment of the license fee, in order to avoid the risk of the penalty, was held to be an involuntary payment.

So in Westlake vs. St. Louis, 77 Mo., 47, where water rents were paid, under threat that the water would be shut off, and to prevent it, the payment was involuntary.

And in Ohio, a liquor license was imposed, and payment made a condition to doing business. Payment, with knowledge that the law imposing the tax was unconstitutional, was held to be an involuntary payment.

Catoir vs. Waterson, 38 Ohio St., 319.

It is enough if the payment be immediately and urgently necessary, in order to avoid the risk of great

loss or injury. In such cases the payment is extorted by the pressure of the risk, in this case a constantly increasing one. The officers charged with the duty of executing the Act of the Legislature have only to say that it is their duty and purpose to execute the Act, and leave the person liable to "walk the floor" and contemplate the disaster which awaits him in the event he is defeated in the courts. He will not long hold out under such a pressure, but will submit to what he regards as a plain, and even tyrannical, deprivation of rights, as the only discrete course open to him.

This question referred to now only to show that the controversy is not extinguished by the payment of the tax for the year ending June 30th, 1890. For, if it was so extinguished, this Court would dismiss the case.

Little vs. Bowers, 134 U. S., 547.

San Mateo Co. vs. Railroad Co., 116 U. S., 138.

This case is easily distinguished from those just cited. In each of those the controversy was limited to specific sums of tax, due for certain years; and in each the payment was held to have been voluntary.

The inference is clearly deducible from these cases, that, if the payments had been involuntary, the controversy would not have been deemed to have been extinguished.

In the case at Bar the controversy was not limited to the tax that complainant has paid. Complainant seeks to have the *act* declared void, *and a decree restraining the execution of the act.* That the tax paid by the complainant is no longer in controversy might be conceded, and still the controversy would not be extinguished. The penalty accrued from June

30th to date of the payment (November 28th, 1890), or to the date of the decree of the Circuit Court (October 29th, 1890), as well as the validity of the Act and its execution in future years, entitle the complainant to prosecute the appeal.

WESTEL W. MORSMAN.

Counsel for the Appellant.

Office Supreme Court U. S.
FILED.
JUL 30 1891
JAMES. H. McKENNEY.
CLERK.

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1891.

No. 1358.

THE PACIFIC EXPRESS COMPANY,
Appellant,

vs.

JAMES M. SIEBERT, STATE AUDITOR, &C., ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri, Caldwell, J.

ADVANCED FOR HEARING OCT. 20th, 1891.

BRIEF OF W. W. MORSMAN, FOR APPELLANT.

Omaha Printing Co.

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1891.

No. 1558.

THE PACIFIC EXPRESS COMPANY,
Appellant,

vs.

JAMES M. SIEBERT, STATE AUDITOR, &C., ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri, Caldwell, J.

ADVANCED FOR HEARING OCT. 20th, 1891.

BRIEF OF W. W. MORSMAN, FOR APPELLANT.

STATEMENT.

The facts necessary to an understanding of the questions to be presented, are as follows:

The appellant, Company, is a corporation of the State of Nebraska, engaged in carrying goods by express, upon railroads. It does business, inter-state as well as intra-state, within the State of Missouri. It does not own its own lines of transportation, but procures its transportation facilities "on contract" with railroad companies.

By an act of the legislature of the State of Missouri, passed May 19, 1889, and entitled "An Act to define express companies, and to prescribe the mode of taxing the same and to fix the rate of taxation thereon," it was provided:

"Any person, persons, joint-stock association, company, or corporation, incorporated under the laws of any State, Territory, or country, conveying to, from, or through this State, or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise, or effects of any kind, by express *on contract with any railroad or steamboat company*, or the managers, lessees, agents or receivers thereof, (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this State), shall be deemed to be an express company." (Record, p. 7.)

By the same act every "such" express company is required to file with the State Auditor an annual report:

"Showing the entire receipts for business done within this State of each agent of such company doing business within this State, for the year then next preceding the first day of April, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies."

And also:

"When such statement is made, such express company shall, at the time of making the same, pay into the treasury of the State the sum of Two Dollars on each one hundred dollars of such receipts; and any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided and to pay the required tax thereon shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered in an action in the name of the State of Missouri on the relation of the State Auditor in any Court of competent jurisdiction, and the Attorney General shall conduct such prosecution; and such com-

pany, corporation, or association, so failing or refusing shall be prohibited from carrying on said business in this State until such payment is made." (Record, p. 8.)

On the 17th day of June, 1890, the plaintiff filed its bill, which after setting forth the facts showing that its business in the state of Missouri was interstate as well as intra-state, (Record, p. 3,) and that it carried on the business described in the foregoing provision defining an express company, "on contract" with railroad companies, (Record, p. 2,) avers that there were:

"Other persons, copartnerships, associations, and corporations residing and doing business within the State of Missouri engaged in conveying to, from, and through the said state and various parts of the same, goods and property of the descriptions aforesaid, by freight and by express, *but not on contract* with any railroad or steamboat company, or the managers, lessees, agents, or receivers thereof, within said state; such persons, copartnerships, associations, and corporations being either provided with their own transportation facilities, or procuring the same by hire from other persons not a railroad or steamboat company or the manager, lessee, agent, or receivers thereof." (Record, p 3.)

The bill further avers:

"That neither the said tax of two per cent., nor any other equivalent tax is imposed by said act, or by any law of the State of Missouri upon other common carriers of goods, or upon persons, associations, or corporations engaged, or who may engage, in conveying property and goods of the descriptions contained in said act, by express, or upon the business or gross receipts of such common carriers, persons, associations and corporations who do not hire transportation by 'contract with any railroad or steamboat company, or the managers, lessees, agents or receivers thereof.'" (Record, p. 5.)

The bill also avers, that the act of the legislature is a void and unconstitutional act, because:

1. The plaintiff being engaged in interstate commerce, "so far, * * * the said act is in violation of that provision of the constitution of the United States which vests in the Congress of the United States the exclusive power to regulate commerce among the several states." (Record, p. 5), and:

2. The act, being applied to the business only when carried on by persons or corporations "*on contract*" with any railroad or steamboat company, "denies to it (plaintiff) the equal protection of the laws of the State of Missouri, in violation of that provision of the fourteenth amendment to the Constitution of the United States which prohibits any state to deny to any person within its jurisdiction the equal protection of its laws." (Record, p. 5), and:

3. The tax imposed by the act, not being imposed upon all of the persons, associations, corporations, * * * or business of the class to which it applies, and to which your orator, its business * * * belong, the tax so imposed is wanting in uniformity, and a violation of Section three (3) of Article ten (10) of the constitution of the State of Missouri, by which it is provided that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." (Record, p. 5 and 6).

After averring that the defendants are about to coerce compliance with the act, by proceeding to enforce its penalties, the bill prays that the act be decreed to be unconstitutional and void, and for an injunction restraining the defendants "from in any manner proceeding to enforce the said act or any penalty therein provided for," etc.

The defendants demurred to the bill, (Record, p. 11) which, after argument, was sustained and the bill was dismissed, and plaintiff was decreed to pay the costs. An appeal was prayed, and allowed in the final decree. (Record p. 13.)

(For the opinion of the Court see Record, p. 14.)

SPECIFICATION OF ERRORS.

The decree of the Circuit Court is erroneous:

1. For the failure to determine the act of the Legislature of the State of Missouri to be void, so far as the same is a regulation of inter state commerce, and perpetually enjoin the defendants from enforcing its penalties upon compliance by complainant with the provisions of the act to the extent of such portion of its gross receipts as are not derived from inter-state commerce, and in determining that the act of the Legislature of Missouri is not a regulation of inter-state commerce.

2. For the failure to determine the act of the Legislature of the State of Missouri to be void *in toto*, and perpetually enjoin the defendants from executing its provisions, upon the ground (1) that said act denies to complainant the equal protection of the laws of the State of Missouri in violation of the fourteenth amendment to the Constitution of the United States; and (2) upon the ground that the act is not uniform in its operation, in violation of Section three (3) of Article ten (10) of the Constitution of the State of Missouri.

FIRST POINT.

(1). The bill prays an injunction. The test of jurisdiction here is, therefore, the value of the object sought to be accomplished by the bill.

Miss. & C. R. Co. v. Ward, 2 Black, 485.

Market Co. v. Hoffman, 101 U. S., 112.

The object of the bill is to restrain the execution of the act of the Legislature of Missouri *by the enforcement of its penalties.* (Record, p. 6.) The penalty imposed is $100 for each day, during which the complainant failed to comply with the law by payment of the tax provided for, and forfeiture of the right to do business in the state during such failure.

The amount, in value, of the matter in controversy is to be ascertained as of the date of the decree dismissing the bill.

Keller v. Ashford, 133 U. S., 610.

Steamship Co. v. Merchant, 133 U. S., 375.

Association v. Miles, 137 U. S., 689.

The penalty of $100 per day began to run on the first day of July, 1890. (Record, p. 8.) The decree was rendered on the 29th day of October, 1890. (Record, p. 13.) This portion of the penalty had, therefore, been accruing during a period of one hundred and twenty days, when the decree was rendered.

The value of the right to do business in the state, also, is shown by an affidavit on file to exceed the sum of five thousand dollars.

(2). The suit is brought on account of the "deprivation of a right * * or immunity secured by the Constitution

of the United States." This Court, therefore, has jurisdiction, irrespective of the value of the matter in dispute.

U. S. Rev. St., 699.

SECOND POINT.

The Circuit Court held that the bill makes out a case in which the remedy at law is inadequate. (Record, p. 17.)

It is said in the opinion:

"It would take months and, possibly, years to reach a final decision of the case, and, if that decision should be favorable to the state, the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of one hundred dollars per day for the whole period and the destruction of its business within the state and probably great injury to its business in other states. Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be or may be attended by the imposition of heavy penalties and forfeitures; and upon this ground and because an action will not lie, under the laws of Missouri, to recover back the tax, if paid, equity has jurisdiction in this case."

The state does not permit itself to be sued, and the act in question requires the tax to be paid to the state treasurer; while, to coerce such payment, it appoints the appellees to execute the act by enforcing its penalities. Any payment made to the state treasurer, is, so far as he is concerned, a voluntary payment, notwithstanding it be made in fear and duress of the penalties provided by the act, and would not afford ground for an action against *him*. He has no power to enforce the act, nor does he demand payment. He merely receives the money when offered him.

Theoretically, the appellant could defend in any suit to enforce the penalties brought by appellees. But it could

not forsee the results of litigation. We may confidently think we are right, but we are often then most mistaken. The courts sometimes err, and defeat often proceeds from the oversight and inadvertence of counsel. The result is always subject to the doubt and uncertainty that beset the efforts of human tribunals and devices. The penalties of the act are so enormous that no prudent person would allow them to go on accumulating while he asserted his rights by defending in actions at law. Common prudence would prompt him to abandon his rights, and submit to the imposition. Indeed, there is no reason to doubt, that in prescribing the penalties for delay in paying the tax, so grossly disproportioned to the injury the state would suffer by mere delay, the object of the legislature was to coerce submission and effectually deny the right to question the validity of the act.

It is not necessary, in order to sustain the remedy in equity, to show there is *no* remedy at law. It is sufficient if the remedy at law be substantially *less adequate* than in equity.

In *Kilbourn v. Sunderland*, 130 U. S. 505, this Court said:

"The jurisdiction in equity attaches unless the legal remedy both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

And in *Sulivan v. Portland*, etc., *Co.*, 94 U. S. 806, it was said:

"The objection that there is a remedy at law, is only available where such remedy is as plain, adequate and effectual, as the remedy in equity."

See also:

Wylie v. Coxe, 14 How., 1.

Boyse v. Grundy, 3 Pet., 210.

It is well settled by the decisions of this Court, that the Courts of the United States will enjoin the execution of an act of the legislature of a state which denies a right which is conferred by, or which has been taken under the protection of, the constitution or statutes of the United States, where the execution of the act will result in loss or injury to the plaintiff.

Osborn v. Bank, 9 Wheat, 839.

Allen v. Railroad Co., 114 U. S. 311.

Cummings v. Bank, 101 *Id.* 153.

Poindexter v. Greenhow, 114 *Id.* 270.

Bank v. Britton, 105 *Id.* 322.

Hills v. Bank, *Id* 319.

Boyer v. Boyer, 113 *Id.* 689.

Pennoyer v. McConnaughy, 140 *Id.* 1.

In *Allen v. Railroad Co., supra.*, the railroad company had tendered in payment of certain taxes, the coupons of bonds issued by the State of Virginia, which, by the law under which they were issued, were receivable in payment of the tax. The state subsequently passed an act prohibiting the receipt of these coupons in payment of the tax. One ground upon which the complainant demanded relief in equity and by injunction, was, "because it is necessary to protect complainant in the immunity to which it is entitled, by virtue of the contract with the State of Virginia, secured against State laws impairing its obligation, by the constitution of the United States." The remedy was sustained on this ground. This Court said:

"The exercise of that jurisdiction, and by means of that remedy in such cases, is to vindicate the supremacy of the constitution, and to maintain the integrity of the powers and rights it secures; and that jurisdiction is vested in the Courts of the United States, because the cases embraced in it are necessarily cases arising under the Constitution and laws of the United States.

"Where the rights in jeopardy are those of private citizens, and are of those classes which the Constitution of the United States either confers, or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies in cases to which its remedies can be applied, that jurisdiction in equity vested by the Constitution of the United States, and which can not be affected by the legislation of the States."

2. There was a threatened multiplicity of suits, and irreperable injury. It is undoubtedly true, as stated in the opinion of the Circuit Court, that no presumption should be indulged that the State, or its officers, would institute more suits than were necessary to effectuate the purposes of the act. But the act imposes cumulative penalties, to be enforced continuously until its provisions are complied with. While it is not probable the appellees would commence a suit each day, for the recovery of the penalty recoverable in money, it is not to be reasonably doubted that successive actions would be instituted, the same process being repeated each succeeding year, so long as the act was not complied with, if that method was once resorted to for enforcing the act. It is not necessary to say that the officers of the State would be acting in pursuance of a "vulgar passion" in so doing. The bill avers that these officers claim the act to be a valid law; that they claim they are charged with the duty of enforcing its provisions, and are under an official duty and obligation to

coerce compliance by proceeding to enforce the penalties provided for; that unless restrained they will proceed by instituting legal proceedings to enforce the penalties and to prohibit the appellant from carrying on its business. The officers of the State are not presumed to have any feeling upon the subject, but they regarded it as a duty imposed upon them by valid law, to compel submission to the requirements of the act, by the means provided in the act. These facts are all admitted upon the face of the record, and from these facts the inference necessarily and logically follows, that in the discharge of what they deemed to be their duty under the act, numerous and successive actions would have been instituted to enforce the penalties prescribed if the appellant had presisted in refusing to comply with the requirements of the act. It is distinctly averred in the bill that, by the institution of proceedings to prohibit the appellant from carrying on its business within the State it would suffer irreperable loss and injury. This is an averment of fact which is admitted by the demurrer, and the fact is obvious from the nature and character of appellant's business as set forth in the bill.

Mortgage Co. v. School District, 19 Fed. Reporter, 359-370.

THIRD POINT.

The Circuit Court, in its opinion, (Record, p. 18), held that the act of the legislature does not impose the tax upon the inter-state business of complainant, and, therefore, that it is not obnoxious to the objection that it is a regulation of inter-state commerce. As this result relieves the complainant from the tax upon its inter-state traffic, it would

seem at first blush, to be all that complainant was entitled to and that no fair exception could be taken by it. But this is only apparently true. As the decree now stands, it leaves the complainant subject to be sued for the penalties which accrued while the injunction was in force.

If the act imposes the tax upon the gross receipts from inter-state traffic, as well as upon those from intra-state traffic, the act, it is well understood, would be void to the extent of the inter-state traffic; and there being no provision in the act for the separation of the inter-state business, and the penalties prescribed being incapable of apportionment, the penalties could not be enforced. The state would be left to its remedy by civil action to compel a separation of the business, and payment of the tax upon so much as was not inter-state.

It is true, no doubt, that in such a case, a court of equity would not grant relief against proceedings to enforce the penalties without a separation, by complainant, of the business, and payment, or tender, of so much of the tax as would be due upon the intra-state business. But the bill was not, and could not, be dismissed upon this ground. The complainant could make no such payment or tender and preserve its contention that the act was, upon other grounds, void *in toto*. It did, however, aver in its bill that it was ready and willing, and would promptly pay to the extent that the act should be decreed to be valid. Further than this it was not required to go. (Record, p. 4, bottom).

If the contention of the complainant that the act imposes the tax upon inter-state traffic is sound, inasmuch as the complainant also contended, upon other grounds, that

the act was void *in toto*, then, notwithstanding there was neither payment nor tender of the sum that would accrue upon the intra-state business alone, the decree, if the contention that the act was void *in toto* was not sustained, should have perpetually enjoined the defendants from proceeding to enforce the penalties of the act, upon payment by complainant of the sum due upon the intra-state business.

Ratterman v. Telegraph Co., 127 U. S., 411.
Telegrayh Co. v. Alabama, etc., 132 U. S. 472.
Leloup v. Mobile, etc., 127 U. S. 640.

As the record now stands it is an adjudication (against the contention made in complainant's bill) that the act does not impinge upon the exclusive authority of congress to regulate inter-state commerce, and prevents the complainant from defending upon that ground in an action at law brought to enforce the penalties of the act. If, therefore, the act does impinge upon the exclusive authority of congress, it is obvious, notwithstanding complainant is relieved from the tax upon its inter-state traffic, that the decree is prejudicial to it.

By the terms of the act it applies to the gross receipts from transportation "to, from, or through this state or any part thereof;" to the "entire receipts from *business* done within this state;" and to the "proportion of gross receipts for business done by such company in connection with other companies." (Record, p. 7). Whether these words embrace inter-state traffic, is the decisive question.

It is said in the opinion of the Circuit Court (p. 18,) that the words "for business done within this state" necessarily import business begun and ended in the state. But, I re-

spectfully think, this proposition is not sound. "Business" is a broad, generic term. It embraces, in this connection, every transaction, every service performed within the state, from which receipts are derived. It is as easily and as rationally applied to that portion of inter-state transportation which is within the state, as to transportation which originates and terminates within. Each is, equally, "business" done within the state. Inter-state commerce may not, correctly speaking, be "business done within the state." But the latter is always included in the former. "Business" done within the state may be, and often is, inter-state commerce, because of its being an essential part of transportation which originates or terminates beyond the lines of the state. Reading the words "business done within the state," in connection with the words "to, from, or through the state, or any part thereof," as used in the first section, there seems to be no reason to doubt that it was the intention of the legislature to include that portion of transportation which should be performed within the state, notwithstanding it may have originated or terminated beyond the lines of the state. In embracing carriers engaged in carrying "to" the state, the legislature had in mind those carriers who take goods at points in other states and deliver them within the state. It used the word "to" in the sense of "into," which is not very uncommon.

It did not refer to carriers who should take goods in other states and lay them down flush with the Missouri line. Probably there are none such, and if there are any, an act of the Legislature of Missouri would not take them in. So, in using the word "from," it did not have in mind

carriers who should take goods at the state line and carry them away from the state. The word is used in the sense of "out of," and with reference to carriers who take goods at points within the state and carry them out of the state to points in other states. And in the use of the words "through the state," it did not refer to the act of transporting from one point within the state to another point, also within the state. Such a transportation is covered by the words "or any part thereof," and would not be spoken of as transportation "through" the state. The thought of the legislature was of transportation that should originate outside of the state, be continued through or across the state, and terminate at points outside of the state. If the legislature had merely had in mind intra-state transportation, it would have described the business by the simple expression, designating a single phase of the business, "conveying between points within this state." But instead of this, it designated four different phases of the business by the use of the words "conveying to, from, or through this state, or any part thereof," obviously intending to cover every act of transportation within the state, notwithstanding the inception or termination of the transportation should be beyond the lines of the state. There can be no reasonable interpretation of the words of the act which does not include the proportion of gross receipts for that part of the carriage which is within the state in all cases.

It is true, that the language, "conveying to, from, or through this state, or any part thereof," is, ostensibly, employed in defining what shall constitute an express company. But the definition serves no purpose but to

designate the business which is subject to the tax. The tax is, in fact, a tax upon the business. It is the fact of being engaged in the business described, and this fact only, that determines the liability to pay the tax. It was the purpose of the legislature to levy the tax upon the business of "conveying to, from, or through this state," so far as the business was done within the state, else persons engaged in such business would not have been included in the description of the persons who are required to report their business and pay the taxes. The persons are described with reference to the business engaged in, and the design as well as the effect of the statute is to tax the business. The form or agency through which the tax is to be collected is not material. The question is, upon what subject of taxation is the burden imposed?

State Freight Tax Case, 15 Wall. (82 U. S.) 232, and cases cited.

Articles taken up in another state to be delivered within the State of Missouri, or to be carried through and across the state, or taken up within the state to be carried out and delivered at points in other states, would, so far as the carriage within the State of Missouri is concerned, be "business done within the state," by any rule of interpretation that does not ignore the plain and obvious meaning of the words of the act. A Court should, if it consistently can, so interpret an act of a legislature as to save it from objection on constitutional grounds. But it cannot ignore the words of the act, or their clear and ordinary meaning, upon an assumption that the legislature understood the situation, and would not knowingly exceed its powers.

In *Philadelphia etc., Steamship Co. v. Commonwealth of Pennsylvania,* 122 U. S. 326, the state undertook to impose a tax upon the gross receipts for "tolls and transportation" received by companies "doing business within the state." This Court held that the imposition of the tax was a regulation of inter-state commerce, in violation of the exclusive powers of congress. It is true, in that case, the business of the company was exclusively inter-state. But this is not important. If the reasoning which controlled the opinion of the Circuit Court in the case at bar is sound, this Court should have answered the contention of the company by holding that inter-state commerce is not "doing business within the state," in the sense of the act. On the contrary, this Court said:

"The tax is levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels, which was for the same purpose. This transportation was an act of inter-state commerce. It was the carrying on of such commerce. It was that, and nothing else."

This Court would hardly have gone into the constitutional question, under the rule which prevails in all Courts, if the case could have been correctly decided by simply holding that the words "doing business within the state," "*ex vi termini*, import business begun and ended within the state, and include only intra-state and not inter-state commerce."

In *Fargo v. Michigan*, 121 U. S. 230, the state sought to impose a tax upon gross receipts "for freight earned within the state." These words are not materially different

in meaning or scope from the words of the act in question in the case at bar. But this Court decided the case upon constitutional grounds, not suspecting that the act did not apply to inter-state commerce.

In *State v. Woodruff &c. Co.*, 114 *Ind.*, 155, the act of the legislature provided that every joint-stock association, company or corporation, etc., "conveying to, from, and through this state, or any part thereof," passengers, etc., * * * "shall be held and deemed to be a sleeping car company." The act then required every such sleeping car company "doing business in this state," to report the gross amount of all receipts, within or without the state, "for fares earned, or business done by such company within this state," and pay a tax upon the same. The language of the act is very similar to that of the act in the case at bar, including the penal clause. The suit was brought to recover the penalty provided for, but the Court held that the act embraced inter-state commerce.

In *Western Union Telegraph Co., v. Alabama, &c.*, 132 U. S. 473, the act of the legislature imposed the tax upon "gross receipts derived from business done in this state." The Supreme Court of Alabama held that these words embraced receipts from messages sent between points in Alabama and points in other states. This being a question of state law, the decision of the Supreme Court of the state was followed by this Court for that reason.

FOURTH POINT.

The act in question is in violation of that provision of the 14th amendment to the Constitution of the United

States, which prohibits any state from denying to any person within its jurisdiction, the equal protection of its laws; and in violation of that provision of the constitution of the state, which requires all taxation to be uniform in respect to the subjects upon which it is levied, within the district levying the tax. The provision of the 14th amendment to the Constitution of the United States, and the provision referred to in the constitution of the state, are equally provisions requiring equal and uniform laws, so far as they relate to the subject in controversy in this suit. There is no difference in principle, between these provisions; but the object of the provision of the Constitution of the United States, was to take the subject of equal legislation under the protection of the national constitution. Its purpose was, to meet the case of states which, notwithstanding any provision in their own constitution, were led to pass unequal laws. Originally, the amendment was adopted for the protection of the Negro race in the southern states; but it has since been repeatedly held by this Court, that its application cannot be restricted to this class of persons, and that it embraces all persons of every description, including corporations, who are within the jurisdiction of the state. As applied to the subject of taxation, it requires that all taxation shall be equal and uniform, in respect to all persons and corporations within the jurisdiction of the state, under like circumstances and conditions.

Barbier v. Connelly, 113 U. S. 27.

In the case last above cited, it was said:

"The 14th amendment * * * undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that

equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country, for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one, than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one, than is prescribed for all, for like offenses."

And further:

"Class legislation discriminating against some, and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment."

In *Railroad Co. v. Mackey*, 127 U. S. 205, speaking of the same subject, it was said:

"And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence, are treated alike under the same conditions."

And in *Railroad Co. v. Humes*, 115 U. S. 512, it was said:

"There is no evasion of the rule of equality, where all companies are subjected to the same duties and liabilities under similar circumstances."

In *Dent v. Virginia*, 129 U. S. 114, the Court said:

"It is sufficient for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights, without due process of law, if it be general in its operation upon subjects to which it relates, and is enforc-

able in the usual modes established in the administration of government, with respect to kindred matters, that is by process or proceedings adapted to the nature of the case."

In the case of *Insurance Co. v. N. Y.*, 134 U. S. 594, the Court said:

"And when such legislation applies to artificial bodies, it is not open to the objection, if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them, and the liabilities to which they are subjected. Under the statute of New York all corporations, joint-stock companies and associations of the same kind, are subjected to the same tax. There is the same rule applicable to all under the same conditions, in determining the rate of taxation."

In *Yick Wo v. Hopkins*, 118 U. S. 356, the Court quoted with approval, the language above quoted from *Barbier v. Connelly*. But in this case the legislation assailed was held to violate the provision of the 14th amendment referred to. It was an ordinance ostensibly adopted for the purpose of regulating the laundry business in the city and county of San Francisco; and the ordinance was held to be void, the Court using this language:

"It divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation, and nature and adaptations of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industries by the mere will and consent of the supervisors, and on the other, those from whom that consent is withheld at their mere will and pleasure."

The Court said further of this constitutional provision:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the law is a pledge of the protection of equal laws."

Many more cases might be cited to the same effect, but these are sufficient.

The provision of the constitution in question has received legislative interpretation. (Revised statutes, section 1977.) By this provision of the revised statutes it is enacted, for the purpose of enforcing the provisions of the constitutional amendment, that all persons within the jurisdiction of the United States shall have the same right in every state and territory, and be "*subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.*" In order to determine whether or not the act of the legislature is uniform and equal, as required by the constitutional provisions referred to, it is necessary to ascertain the *sphere of operation* of the act. If, within this sphere of operation, it affects all persons equally and uniformly under like circumstances and conditions, it is not obnoxious to the provision of either constitution. But, on the other hand, if it create a burden upon some persons and not upon others under the same circumstances and conditions, it is then an obvious violation of these constitutional provisions. But the *sphere* of the operation of this act is not limited to those upon whom its burdens are cast. Those who are exempted are equally within the sphere of its operation, though excluded from its provisions. It will be found, therefore, that the sphere of operation of this act, in respect to the subjects upon which its burdens are cast, embraces all carriers by express. But the legislature has undertaken to define what shall constitute an express carrier for the purposes of the act, and in so defining it divides the subject into two classes: one class carry-

ing on its business and procuring its transportation "on contract with any railroad or steamboat company," while the other class, carrying on the same business in all respects, either owns its own transportation facilities ormay procure them from some other person or corporation, provided it be not a railroad or steamboat company. Upon the former class this act, as the result of the definition of an express company, imposes the tax, while upon the latter it does not. This is a purely arbitrary distinction, not based upon any intrinsic difference in the character of the business, or in the use of the property employed in it. It is a merely arbitrary line, upon one side of which the legislature has undertaken to place all carriers by express who hire transportation facilities from any railroad or steamboat company, and upon the other, all carriers by express who do not; imposing upon one the burdens of taxation from which the other is entirely exempt. It is precisely as if the state should impose a tax upon all merchants doing business in leased houses, and exempt from the same tax all merchants of the same character carrying on the same business in houses of their own. Under this act, it is obvious that a railroad company doing express business upon its own line of road is not within the provisions of the act, and is not subject to the tax imposed, because it is not doing the business "on contract with any railroad or steamboat company." The legislature, in defining what should constitute an express company for the purposes of this act, evidently intended to exclude, and the language employed does certainly exclude all express companies or persons doing the business described in the act, who own their own lines of transportation or procure transportation facil-

ities by contract with some other person or corporation than a railroad or steamboat company. Yet it is obvious that a railroad company doing the character of business specified in the section defining an express company, over its own line of railroad, would still be an express company with respect to that particular business, notwithstanding any effort of the legislature to exclude it by definition. The legislature can no more say that a railroad company, prosecuting the business referred to in this act, is not, in fact, an express company, than it can say that a black man carrying on the dry goods business is not a dry goods merchant equally with a white man prosecuting the same business. The mere fact that one corporation or person denominates itself an express company, while the other denominates itself a railroad company, affords no distinction that will justify the legislature in saying that one is an express company and the other is not, when it proposes to levy a tax upon the *pursuit or occupation* in which each are alike engaged. The "business" is precisely the same in both cases. Both parties are engaged in the same occupation, and no definition can change it. It is the occupation or business which the legislature proposes to tax. It cannot make a discrimination not based upon any intrinsic difference in the occupation, but resting solely upon the mere difference of name in the parties pursuing it, without raising a discrimination prohibited by each of the constitutional provisions referred to. The distinction would be as well, and as legally, rested upon a difference of color, or sex, or age.

A railroad company prosecuting the business of carrying by express, as a separate department of its business, has

been expressly held in Tennessee, to be an express company, within the provisions of the statute of that state. That state passed a law imposing a tax upon all express companies, not, however, attempting to define, as in the Missouri act, what should constitute an express company. The railroad company claimed that it was not subject to the tax, on the ground that it was not an express company; but the Supreme Court of the state properly denied the contention, and held that the railroad company was an express company within the sense of the act imposing the tax, in respect to that particular branch of its business. The Court said in its opinion:

"It is but just that this shall be the construction to be given to our acts of assembly; otherwise, a company or individual engaged in the express business solely, might be burdened, and would be burdened with taxes, while another company or individual organized as in this case, in another jurisdiction, and existent there under a different name, could establish its agents here, and by calling its occupation a department of its other business, be allowed to enter fully into competition with the regular business, and pay no tax at all."

Memphis, etc., Co. v. Tennessee, 9 Tenn. 118.

The inequality, however, referred to by the Supreme Court of Tennessee, would not only follow in the case of a person or company carrying on another business in connection with the express business. Under the act of the legislature of Missouri in question, a corporation may call itself an express company, and be doing an exclusively express business, and yet not be subject to the burdens imposed by the act, provided it does not obtain its transportation facilities by "contract" with a railroad or steamboat company. By no possible interpretation of the act, could

such a person or corporation, though prosecuting the express business exclusively, or in connection with some other business, be brought within the act and subjected to its burdens, if it did not obtain its transportation facilities by "contract" with a railroad or steamboat company. It was the obvious purpose and intenti n of the legislature, to apply the act only to those persons or corporations doing an express business, who do so obtain their transportation freilities. If it is possible for a state, by thus defining what shall constitute a particular business, to subject only a portion of the persons engaged in it to the burdens of taxation, while exempting all others, it is equally possible by definition, to deprive any citizen or class of citizens, or persons within the state, of any constitutional right. It is not definition at all, but arbitrary discrimination. The definition does not embrace, and was not intended to embrace, all persons engaged in the same occupation. It was a device to include only a portion of such persons.

I do not, of course, contend that the burden of taxation must fall with absolute equality on all persons. This has never been deemed attainable; but there is a plain distinction between those inequalities which result from uncontrolable circumstances, and those which are created through design, or inadvertence, by the law-making power itself. The first are inseparably connected with, and proceed from, the errors or infirmities of men. They do not contravene any principle of equality. The last are utterly inconsistent with, and destructive of every principle of equality; and in this case were designed to produce equality.

The act in question is an attempt to levy taxes upon a particular business or occupation. If such a tax be laid

equally upon all persons engaged in the same business, or who may engage in it, there is no inequality, because all in the same situation are treated alike; but if the tax be laid upon only a portion of those engaged in it, while others are left free to pursue it, there is an obvious inequality created by the law-making power itself. It is not classification, but simple discrimination. The burden is imposed upon one set of persons, while another set of the same class, pursuing the same business, under the same circumstances, and in the same place, are exempt from it. It has been said in the text books, and in the opinions of the Courts, that the power to tax is a power to destroy; and this is true.

McCulloch v. Maryland, 4th Wheat. 316.

California v. Central Pacific R. R. Co., 127 U. S., page 1.

No surer test of the inequality of taxation designed and produced by the act of Missouri in question, can be found, than by applying this doctrine to the question. Let it be supposed that the act imposes a rate of taxation which will take all profit from the business of those companies who are subjected to it, and the discrimination will very quickly appear. The *business* of carrying by express would not be destroyed. One set of persons would be driven out of it for want of profits, while another set would be allowed to take it up; precisely the same business, conducted in the same manner, and prosecute it with success. Those who rely in the prosecution of their business upon contract with any railroad or steamboat company, as a means of obtaining their transportation, would be driven out of the business

by the burdens imposed by this act, while those who owned transportation, or who obtained it from other persons than a railroad or steamboat company, would continue to prosecute it, or take it up at pleasure, relieved of this burden. Whereas, if the act was equal and uniform in its operation, the business itself would be destroyed; for then, the law would lay the same blighting hand upon all who engaged in the business. It is not possible to conceive of a more palpable, arbitrary and invidious discrimination. But the difference between a tax that takes all profit from the business, and the tax imposed by this act, is one of degree, merely. The principle is the same whether the tax be increased or diminished. It is an exaction from business when carried on by one set of persons, that is not made when the same business is carried on by another set of persons in the same place, and under precisely the same circumstances and conditions. There is no personal or property right guaranteed by the Constitution of the United States, or of the state, that may not be invaded with equal sanction; and if this legislation can be enforced, it is idle to talk of constitutional limitations. I do not deny that the legislature may classify subjects for the purposes of taxation, but it can not do so, arbitrarily, by legislation having no reference to an intrinsic difference of circumstances and conditions. It cannot, arbitrarily, divide those engaged, or who may engage, in the same business, into different classes, imposing burdens upon one and exempting another. This is not classification at all, but a mere division of the same class, or subject of taxation. It is discrimination, pure and simple.

In *Cooley on taxation*, page 169, it is said:

"A tax laid exclusively on merchants' goods might not be burdensome to those who, in the first instance paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust, though laid upon a single occupation, *provided that it was so laid that none who followed that occupation escaped it.* Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in a particular locality, or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible."

This subject was discussed by this Court, in what were known as the *Connecticut Railroad Tax Cases*, 115. U. S., 321. In that state railroad property had been classified for the purpose of taxation, and a different method of assessment and valuation adopted, from that which was applied to other classes of property. The railroad companies contested the validity of the tax, upon the ground that the law was in violation of the last clause of the fourteenth amendment to the Constitution of the United States. This contention on the part of the railroad companies was denied by this Court, but the denial was put upon the ground that the act of the legislature was a proper exercise of the power of the state, to classify subjects for the purpose of taxation. In the course of the opinion, the Court said:

"The rule of equality in respect to the subject, only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar

circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justifies the discrimination in this respect, which the discretion of the legislature has seen fit to impose."

The classification in this case was obviously based upon an intrinsic difference in the character of the property, its situation, and the nature of the use made of it, from that of other corporations and other tax payers. It was plainly an exercise of the power of classification; but the unmistakable implication, from what the Court said is, that if the legislature had attempted to adopt a different rule of taxation, or method of ascertaining value of property, which was of the same character and devoted to the same uses, the act would have been in violation of the fourteenth amendment.

In the case of *State v. Township*, 36 New Jersey, 66, it was said by the Court:

"Taxation operates upon a community, or a class in a community, according to some rule of apportionment. When the amount levied upon individuals is determined without regard to the amount or valuation exacted from any other individual or classes of individuals, the power exercised is not that of taxation, but of eminent domain. A tax upon the persons or property of A, B and C, individually, whether designated by name, or in any other way, which is in excess of an equal apportionment among persons or property, of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use, without compensation. The process is one of confiscation, and not of taxation."

In *Lexington v. McQuinlan's Heirs*, 9 Dana., 519, it was said:

"Whenever the property of a citizen is taken from him by the sovereign law and appropriated without his consent, to the benefit of the public, the exaction should not be considered a tax unless similar contributions be exacted by the same public law from such members of the same community as own the same kinds of property; and although there may be a discrimination in the subjects of taxation, still, persons of the same class, and property of the same kind, must generally be subjected alike to the same common burden."

In *Field v. Commissioners*, 36 Ohio State 476, the constitution of the State of Ohio required all real and personal property to be taxed by a uniform rule, and according to its true value in money. An act of the legislature provided for the location and establishment of turnpike roads by the county commissioners, and for the levy of a tax, in order to pay for the construction, upon the county; but the act also provided that no such tax should be levied on any lands which had previously been assessed for the construction of any free turnpikes, or improved road, theretofore constructed, or in process of construction within the county. This latter provision, it was held by the Supreme Court, was clearly in conflict with that provision of the state constitution, requiring all real and personal property to be taxed by a uniform rule.

In *St. Louis v. Bowler*, 94 Missouri 634, an ordinance of the city of St. Louis taxing the occupation of butchers, was sustained by the Supreme Court upon the ground that it operated equally upon all engaged in the particular occupation. In the course of the opinion, the Court said:

"If, in this case, the ordinance in question had attempted anything in the way of artificial or arbitrary classification, classification in semblance but not in reality, classification which amounted to invidious discrimination against persons really belonging to the same class, as in Speigels' case, *supra*, then, the complaint of the defendant, that he had been denied the equal protection of the laws, would have had a better foundation."

But in the case of *St. Louis v. Speigels*, 75 Missouri 145, (S. C. 90 Mo. 590), an ordinance of St. Louis taxing the occupation of butchers, was held to be void for want of uniformity, because it did not operate equally upon all persons carrying on the same business in the same district.

Discriminations similar to that of which complaint is made in the case at bar, have frequently been condemned by this Court, under the act of congress, with reference to the taxation of national bank shares by the states.

In *People v. Weaver*, 100 U. S, 539, the legislature had provided for the deduction by the taxpayer, from his assessments, of an amount equal to his *bona fide* indebtedness; but this deduction was not allowed, in respect to national bank shares. The act of congress, having authorized the state to tax national bank shares, prohibited it from taxing such shares at a greater rate than should be levied upon other moneyed capital, within the state. The object of this prohibition was, of course, to place capital invested in national bank shares upon an equality, in respect to taxation, with capital otherwise invested. The requirement of the act of congress was not different in principle, from the requirements of the constitutional provisions here relied upon, in respect to to the protection of equal laws and uniform taxation. This Court held that the

state statute authorizing the deduction of indebtedness, in respect to other property than national bank shares, was a discrimination against national bank shares, and in violation of the act of congress.

See also, *Bank v. Britton*, 105 U. S. 322.

The Missouri act in question, is an attempt to impose a tax upon business done by express companies, as defined in the act; the definition of the act, expressly excluding other persons and corporations doing precisely the same business, in the same manner, and in the same jurisdiction. It is a discrimination between "persons" doing the same business; the discrimination being based solely upon the ownership or want of ownership of the facilities with which the business is carried on. The discrimination has no relation whatever, to the character of the business, to the place where it is carried on, or to the manner in which it is conducted. The act selects one portion of a class of persons whose fortune, or misfortune, as the case may be, requires them in the management of their business, to secure transportation facilities by contract with a railroad or steamboat company; and upon this portion of the class it imposes the burden, while upon the remaining persons, who do precisely the same business, no burden is imposed. Under this act, if an express company, as defined, be doing business on contract with a railroad company or steamboat company, and therefore subject to the tax imposed, should become the owner of a railroad or steamboat, it would at once be exempted from the tax upon its business. On the other hand, if an express company be doing business upon its own lines of transportation, or upon lines of transporta-

tion not owned by a railroad or steamboat company, and therefore not subject to the tax, should either sell its own line of transportation or carry its business upon a line of transportation owned by a railroad or steamboat company, it would at once become subject to the tax imposed by this act. Also, two express companies may be doing the same business, side by side, between the same towns, one on contract with a railroad or steamboat company, the other upon its own lines; the first is subject to the tax, the last is not; and if the one doing business upon its own lines should exchange its position for that of the one doing business upon the lines of some railroad or steamboat company, the burden of taxation would immediately shift from one to the other. It is obvious from this statement, that the imposition of this tax is based upon the ownership or non-ownership of the facilities for transportation. It is a most singular case when a tax is imposed upon an occupation or business, because of the lack of ownership of the facilities for doing it. If a tax was imposed on all merchants doing business in leased stores, and not upon those doing business in store rooms owned by themselves, it would at once be pronounced an unconstitutional discrimination. The principle is precisely the same, in the case at bar.

A kindred question involving the same principle, has been decided by the Circuit Court of the United States for the District of California, in two cases, in each of which Mr. Justice Field, as well as Judge Sawyer, wrote an elaborate opinion.

County of San Mateo v. Southern Pacific R. R. Co., 8 Sawyer 238.

County of Santa Clara v. Southern Pacific R. R. Co., 9 Sawyer 165.

The Constitution of the State of California, among other provisions in relation to taxation, required that in the assessment of property for the purpose of taxation, a mortgage upon real estate should be treated as an interest in real estate, and taxed to the mortgagee; but an exception was made in respect to the property of railroad and other quasi public corporations. The property of the Southern Pacific railroad company was encumbered by mortgage, and in making the assessment of its property for taxation, the board of equalization of that state, made no allowance for the amount of the mortgage, but assessed the whole value to the railroad company. The railroad company contended that this constitutional provision of the State of California was in violation of the last clause of the fourteenth amendment to the Constitution of the United States. In the San Mateo county case, speaking of the scope of the last clause of the fourteenth amendment, Mr. Justice Field said:

"Whatever the state may do, it cannot deprive anyone within its jurisdiction, of equal protection of the laws; and by equal protection of the laws, is meant, equal security under them, to everyone on similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions, in every form and under any pretence, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive bur-

dens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at one per cent. on the value of his property, and another at two or five per cent., or where one may be thus taxed according to his color, because white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate, proportionate to the value of his property."

And further on:

"What is called for under a constitutional provision requiring equality and uniformity in the taxation of property, must be equally called for by the fourteenth amendment. The forced contribution from one, which would allow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection which the amendment requires the state to extend to every person within its jurisdiction."

And speaking of the subject of classification, after holding that taxation upon business in the form of licenses might vary according to the calling or occupation licensed, yet, that it must be uniform upon all persons engaged in the same business or occupation, in the same locality, Justice Field said:

"It is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner."

May it not be said with equal force, that there is no classification of the subject of taxation in the case at bar, and that the act of Missouri simply provides for unequal taxation among persons conducting the same business, the

burden being imposed by the act upon the less fortunate persons?

Judge Sawyer, in speaking of the subject of classification in the same case, said:

"Different kinds of property may require to be taxed in different forms and amounts, in order to be equally taxed and classifications of property for purposes of taxation should have reference to the just equality of burdens, so, far as that is practically attainable; classification should have reference to the different character, situation and circumstances of the property, making a different form or mode of taxing proper if not absolutely necessary. It cannot be arbitrarily made with reference to the nationality, color or charac er of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation or circumstances of the property. If the arbitrary discrimination and classification found in this case can be legally made under the Constitution and law of the land, then the Constitution, or the law can be so framed as to dispose of a man's rights in property of all kinds, by arbitrary classification and definition, without regard to the real facts, circumstances or conditions of the property. A person may be classified and defined out of the equal protection of the law, and if so, with reference to this provision, he can also be classified and defined out of uniformity in the operation of the law in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guarantees of the Constisution, state or national."

And in the Santa Clara county case, Judge Sawyer quotes from the argument of Senator Edmonds, the following:

"The basis of the imposition being property, as such, the fact that certain property is owned by a corporation, or a white man, or a man of bad character, or a clergyman, cannot be made the ground of the levy; that, both in form, in fact, and in result, is unequal and injurious. Any other

doctrine necessarily implies that the state may carry such unequal exactions to the extent of complete confiscation by edict, of all the property of any class or man, who, during the passion of the hour, may not be in the sunshine of popularity."

What is the basis of the imposition in the case at bar? Is it not the *business of carrying by express?* Upon what principle of equality can the imposition be laid upon those who hire their transportation from railroad and steamboat companies, and withheld from those who do not? Is not the business which constitutes the basis of the imposition precisely the same in both cases? These questions seem to answer themselves; but the act provides (Record, page 7), that:

"Any person * * * or corporation * * * conveying to, from, or through this state, or any part thereof, money, packages * * * or effects of any kind by express, on contract with any railroad or steamboat company * * * shall be deemed to be an express company."

It then proceeds to impose a tax upon the gross receipts derived from carrying on such business. Is it not clear that the tax is imposed upon the business described? An imposition upon the gross receipts derived from a particular business, or upon the persons carrying it on, and because they carry it on, is an imposition upon the business itself, and nothing else? If there is no business there is no imposition. It is no answer to say, as is said in the opinion of the Circuit Court, that the act imposes the same burden upon all "express companies" under the same circumstances and conditions. The tax is not imposed upon all express companies, but upon all express companies *as defined by the act*, the definition being based upon the business peculiar to express companies, but arbitrarily exclud-

ing those engaged in the same business in all respects, but who do not carry it on "on contract with any railroad or steamboat company."

It is said in the opinion of the Circuit Court (Record, page 22):

"The express business taxed by this act differs so materially from that conducted by other common carriers, and is so clearly defined and understood to be a distinct and separate branch of business, that it was eminently proper, if not imperatively necessary, if it was to be taxed at all, for the legislature to classify it by itself, and having so classed it, it was competent for the legislature to impose such a tax on its earnings for business done within the state as its wisdom dictated, not in excess of any limit prescribed by the constitution of the state."

Applying the foregoing proposition to the business of carrying by express, by all persons, without regard to whether they own their own lines of transportation or procure transportation by hire from a railroad or steamboat company, its soundness is not to be denied; but as applied to the case at bar, it begs the very question in issue, for it assumes that the act applies to the "express business" generally.

It is further said in the opinion of the Circuit Court (Record, page 23):

"The plaintiff's contention is, that those carriers who own their own transportation and are common carriers of all manner of freights, shall be taxed at the same rate and by the same method as those carriers who hire their transportation, and whose business is limited to the carriage of express matter. In a word, that for purposes of taxation, railroad companies shall be classed with express companies, and taxed at the same rate and by the same rule."

But this is an entire misconception of the plaintiff's contention, due perhaps, to redundant allegations in the bill.

It is not denied that the express business may be made a distinct and separate subject of taxation, and taxed at a different rate and by a different method from those applied to other kinds of business; and it is not contended, and has not been at any time contended, that express companies should be classified with railroad companies, or that their business should be classified together for the purposes of taxation; but it is contended that if a tax be levied upon the *business of carrying by express*, as is attempted to be done in the act in question, the same tax and the same method of taxation must be levied upon and applied to the same business when it is carried on by a railroad company, notwithstanding the railroad company may be engaged at the same time in carrying ordinary freight. If this position is not sound, it is entirely possible for the legislature to impose such a burden by way of taxation upon the express business, applying it solely to those persons who obtain their transportation by hire from a railroad or steamboat company, as to transfer the whole business from what is now known as express companies to the railroad companies.

The opinion of this Court in the case of *Home Insurance Co. v. New York State*, 134 U. S., 594, quoted from in the opinion of the Circuit Court, is not at all applicable to the question involved. The act in question does not impose the tax upon artificial bodies. In its very terms it applies to any "person, persons, agent, joint-stock association or corporation," engaged in the business described by the act. It is not an attempt to impose a personal tax upon all of a given class of persons, natural or artificial,

but plainly and simply an attempt to tax a certain kind of business, provided the business be carried on by persons who obtain their transportation facilities on contract with any railroad or steamboat company.

It is further said in the opinion of the Circuit Court (Record, page 20):

"It is not averred in the bill, and was not contended in argument, that any person, company or corporation, engaged exclusively in the express business, owns and operates its own railroads and steamboats for the exclusive purpose of carrying its express messengers and freights. There are no such express companies."

How can it be material whether a person engaged exclusively in the express business owns and operates its own railroads and steamboats for the exclusive purpose of such business, or whether the same business be carried on by persons who own and operate such railroads and steamboats for the purposes of their express business, together with the business of carrying ordinary freights? Is not the railroad company who does its own express business an express company to the extent of that branch of its business? Surely it would not be competent for the legislature to impose a tax upon the business of dealing in groceries where the business was carried on by an exclusive dealer, and exempt the same business if carried on by a person who, also in connection therewith, sold other kinds of merchandise. Besides, whether there are such express companies doing an exclusive express business, and owning and operating their own lines of railroads and steamboats, is immaterial, inasmuch as such companies may at any time be created and engage in the business. The constitutional validity of this act is not to be determined by what is, in

fact, being done under it at present, but by what may be done under it. In the case of the *County of San Mateo v. Southern Pacific Railroad Co., supra*, Mr. Justice Field quoted from the opinion of the Court of Appeals of New York:

"The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done."

This proposition is too obvious for controversy. If it were not so, a Court called upon to determine the constitutional validity of an act of the legislature might be impelled to sustain its validity on one day, and on the next day decide the same act to be invalid. Not because of any change in the act, or of the constitution, but because of a mere change in the condition of things permitted to be done under the act.

It is averred in the bill (Record, page 3), and of course admitted by the demurrer: "That at the time, and during the period aforesaid, there were and there are now, other persons, copartnerships, associations and corporations residing and doing business within the State of Missouri, who were engaged in conveying to, from and through the said state, and various parts of the same, goods and property of the descriptions aforesaid, for hire by freight and by express, but not on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof within said state; such persons, copartnerships, associations and corporations being either provided with their own transportation facilities or procuring the same by hire from other persons, not a railroad or steamboat company, or the managers, lessees, agent or

receiver thereof." It is a well known fact that many of the railroad companies of the country carry on their own express business upon their own roads, and it was the purpose of this paragraph of the bill to lay the foundation for the introduction of evidence that certain railroad companies in the State of Missouri were carrying on the express business; though as already stated, it was an unnecessary averment, inasmuch as the validity of the act must be determined by what may be done under its authority, and it is obvious that any railroad company may at any time that it chooses, organize and carry on its own express business upon its own lines of transportaeion, and not be subject to the act in question. Of course it is true, as is stated in the opinion of the Circuit Court, that such a railroad company would not escape taxation, but that fact is immaterial. If the tax is imposed upon a particular kind of business, and a railroad company is engaged in that business, it must, so far, be subjected to the same rate and method of taxation. We must in every case, look at the basis upon which the imposition is levied. If it be upon property, then *all* property of the same character and use in the same taxing district, must be subjected to it. If it be upon business, then *every* person conducting the same kind of business in the same taxing district, must be equally subjected to the same method and rate of taxation. The constitution (state and national) requires uniformity in respect to the subject upon which the imposition is cast. Classification, or pretended classification, cannot defeat these requirements; yet, if the definition given by the act in question be classification, then there is no constitutional right, either state or national, which may not

be thus directly denied by the state; for in this case, it was the obvious purpose and intention of the legislature to create inequality. The legislature may have thought it justifiable or convenient, and, it probably did so think, but its purpose and intention is none the less apparent. It is a self-evident proposition that classification cannot be resorted to for the purpose of applying methods of taxation in conflict with the constitutional provisions guaranteeing to every person equality of taxation.

The precise question involved in this case, has been decided by the Supreme Court of Texas. The Constitution of that State contains a provision requiring that the taxation of occupations shall be uniform "upon the same class of subjects within the limits of the authority levying the tax."

In the case of *Pullman Car Company v. Texas*, 64 Texas, 294, a statute of Texas provided: "From every person, firm, or association of persons, owning or running any palace, sleeping or dining-room cars, not owned by the railway company, on any railroad in this State, there shall be collected an annual tax of two dollars per mile for each and every mile, of any and all railroads in this State, over which such cars may run." It will be observed, that this tax of two dollars per mile was levied upon every person operating sleeping cars, upon any road in the State of Texas not owned by the person operating the sleeping cars, while no tax was imposed upon a railroad company operating sleeping cars upon its own line of road. The tax was imposed upon *owners* of the sleeping cars who run them, or permitted them to be run, upon railways *not*

owned by the owners of the cars. The tax was also imposed upon persons *operating* sleeping cars, upon railroads *not owned by themselves*, but upon railroad companies who either owned or operated sleeping cars upon railways belonging to themselves, the tax was not imposed. The Court held that the tax was an occupation tax, levied upon the business or occupation of running and operating sleeping and dining cars; that the business of running and operating such cars, was precisely the same, whether conducted by persons or corporations upon the railroads of other persons and corporations, or conducted by corporations and persons owning the railroads. In the opinion it is said:

"The legislature may classify subjects of taxation, and these classifications may, as they will, be more or less arbitrary; but when the classification is made, all must be subjected to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it, unless exempt under some other constitutional provision. The fact that a railway company owns the railway over which it runs its own, or the cars of some other person, cannot affect the question of classification; *for such ownership is not one of the elements on which others are placed within the class.* A classification which would impose such a tax on the merchant, banker, auctioneer, dentist, lawyer or such other person who does not own the house in which he pursues his occupation, while it does not subject to such taxation persons following the same occupation in houses owned by them, would at once be declared an infraction of the constitution which declares that 'all occupation taxes shall be equal and uniform upon the same class of subjects.'"

In the case of *People v. The Central Pacific Railroad Company*, 83 California, 393, the legislature of that State had passed an act creating a scheme for the taxation of

the property of railroad companies whose roads were "operated in more than one county in this state." The same provisions were not, of course, extended to the property of railroad companies whose roads were operated in but one county within the state. The constitution of that state contained a provision prohibiting the legislature from passing local or special laws for the assessment or collection of taxes, or for extending the time for the collection of taxes. The attempt of the state to collect the taxes according to the scheme before mentioned, was resisted by the Central Pacific Railroad Company, upon the ground that the act was in violation of these provisions of the constitution of the state, and the Supreme Court of that state held the act was invalid. After referring to a number of different points of objection the Court said:

"These are but a few of the points of difference between the general and special provisions of this law, but they are sufficient to show a marked and broad discrimination against the owners of railroad property situated or operated in two or more counties of the state. It is a discrimination which is not made against, and does not apply to railroad property and the owners of railroad property generally, but only when the property is situated in two or more counties. It is a matter of common knowledge that there are numerous railroads in this state, each situated wholly in one county; to such this special mode of taxes has no application. While it is true that a law which applies to all of a class in a state is held to be a general law, * * it is equally true that one which applies to only par of a class, is special, and under a constitutional inibition like ours, is void."

In the case of *Dundee Mortgage etc. Co. v. School District No. 1*, 19 Federal Reporter, page 359, the legislature of Oregon had passed an act, the object of which was to tax

mortgages as a part of the realty upon which they rested, and providing for the sale of the mortgages by the officer authorized to collect the tax, upon its non-payment. The act provided that a mortgage "whereby land or real property situated in no more than one county of this state, is made security for the payment of a debt together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property;" and also, "shall be assessed and taxed to the owner of such security and debt, in the county, city or district in which the land, or real property affected by such security, is situated;" and also that all mortgages "hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void." Under these provisions of the act, it was contended that inasmuch as the act imposed a tax upon mortgages resting upon land situated in but one county, and did not provide for the same imposition upon mortgages theretofore executed, upon land situated in two counties, the act was unsonstitutional and void. In the course of the opinion, the Court said (page 371):

"An act providing for the assessment of mortgages generally, is, so far, a general act. It comprehends the *genus;* but an act providing for the assessment of all mortgages for sums exceeding $500.00, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood lands, plow lands, or river lands, is special; and in my judgment, an act that taxes mortgages on lands in no more than one county, to the exclusion of those on lands in more than one county, is in the same category. It does not comprehend the *genus* mortgages, but only the species—one-county mortgages.

Without imputing to the state that passed this act any other purposes in making this discrimination between one and two-county mortgages, than a desire to avoid the supposed inconvenience of applying it to the latter, it is well to remember that special legislation in the imposition of taxes, is sure, if unrestrained, to run into partiality, oppression and injustice. * * * Admitting that the legislature cannot discriminate between mortgages on the ground of the locality of the property affected by them, it follows that so long as there are any two-county mortgages in existence in the state, an act taxing only one-county mortgages is open to the objection of want of uniformity.'

The difficulty pointed out by the Court in the case last cited is precisely the difficulty in the case at bar. The act in question, in providing a scheme for the taxation of the business of carrying by express not only does not include the *genus* "express business," but it does not comprehend all, or all persons engaged in prosecuting a particular or peculiar branch of that business. It embraces the express business, and imposes its burdens upon that business *only* when it is carried on by persons who procure their transportation facilities by hire from a railroad or steamboat company, while it exempts those who own, or may own, their own lines of transportation. It is a discrimination that, if pursued sufficiently, would destroy all of the existing express companies (known as such) who carry by rail, and turn the business over to the owners of the railroads; not because the railroad companies could render, nor to secure, a cheaper or more efficient service to the public than is now rendered, but because the express companies could not survive the burden from which the railroad companies would be exempt.

WESTEL W. MORSMAN.

Office Supreme Court U. S.
FILED,
OCT 14 1891
JAMES H. McKENNEY,
CLERK.

No. 1558.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

THE PACIFIC EXPRESS COMPANY, APPELLANT,

vs.

JAMES M. SEIBERT *et al.* APPELLEES.

Appeal from the Circuit Court of the United States for the Western Division of Missouri. Hon. Henry C. Caldwell, Judge.

ADVANCED FOR HEARING OCT. 20, 1891

Brief of JOHN M. WOOD, ATTORNEY-GENERAL,
For Appellees.



—IN THE—

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

No. 1558.

THE PACIFIC EXPRESS COMPANY, APPELLANT,

vs.

JAMES M. SEIBERT *et al.* APPELLEES.

Appeal from the Circuit Court of the United States for the Western Division of Missouri. Hon. Henry C. Caldwell, Judge.

ADVANCED FOR HEARING OCT. 20, 1891.

Brief of JOHN M. WOOD, ATTORNEY-GENERAL,
For Appellees.

STATEMENT.

Having abandoned several of the points presented in the bill against the validity of the act of the Legislature in question, appellant asks that the decree of the circuit court be reversed upon the following grounds:

1. Because it failed to determine that the act of the Legislature in question imposes a tax upon interstate commerce, and, to that extent, is void.

2. Because it determined that said act of the Legislature does not impose a tax upon interstate commerce.

3. Because it did not determine that said act denies to complainant equal protection of the laws of the State of Missouri, and is in violation of the fourteenth amendment of the Constitution of the United States.

4. Because it did not determine that said act is not uniform in its operation, and is in violation of section 3, article 10, of the Constitution of the State of Missouri.

The following is a copy of the act of the Legislature of Missouri under consideration:

AN ACT to define express companies and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon.

SECTION
1. "Express company" defined.
2. Company to make statement, penalty—payment to treasurer, failure to do so.
SECTION
3. Emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Any person, persons, joint stock association, company or corporation incorporated under the laws of any

State, territory or country, conveying to, from or through this State or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise or effects of any kind by express, on contract with any railroad or steamboat company, or the managers, lessees, agents or receiver thereof (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this State), shall be deemed to be an express company.

SEC. 2. Every such express company shall annually, between the first day of April and the first day of May, make and deliver to the State Auditor a statement, verified by the oath of the officer or agent making such report, *showing the entire receipts for business done within this State* of each agent of such company doing business in this State for the year then next preceding the first day of April, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies: Provided, that the amount which any express company actually pays *to the railroads or steamboats within this State for the transportation of their freight within this State* may be deducted from the gross receipts of such company as above ascertained; and provided further, that said amount paid to the various railroad or steamboat companies for transportation shall be itemized, showing the amount paid to each railroad or steamboat company; and provided further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or charged *for the business done within this State* for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county and the total amount received for all the counties. In case of the failure or refusal of such express company to make such statement before the first day

of May, it shall then be the duty of each local agent of such express company within this State, annually, between the first day of May and the first day of June, to make out and forward to the State Auditor a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of April. When such statement is made, such express company shall, at the time of making the same, pay into the treasury of the State the sum of two dollars on each one hundred dollars of such receipts. And any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided, and to pay the required tax thereon, shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the State of Missouri, on the relation of the State Auditor, in any court of competent jurisdiction, and the Attorney-General shall conduct such prosecution; and such company, corporation or association so failing or refusing shall be prohibited from carrying on said business in this State until such payment is made.

SEC. 3. There being no law in this State by which such express companies are taxed creates an emergency within the meaning of the constitution; therefore, this act shall take effect and be in force from and after its passage.

Approved May 16, 1889.

The propositions of law relied upon for reversal of this case are so ably discussed and so completely refuted by the learned judge who delivered the opinion in the court below, that little more will be attempted in this brief than a mere recital of the portions of that opinion bearing on these propositions.

I.

The amount involved in this suit is not sufficient to give this Court jurisdiction. The amount in dispute does not equal

or exceed five thousand dollars. It is said in the complaint that if it be held that the act only applies to business done between points wholly within the State of Missouri, then complainant will be required to pay $3,143.84. In the court below it was not claimed by appellees that the act applied to any business, except such as was done between points wholly within this State, and the Court, in construing the act, so held in its opinion.

The real and direct question presented and passed upon by the court below was as to the validity of the law requiring appellant to pay the tax imposed, and the amount and value of the tax involved by the decision of the Court, as shown by the record here, is the test of the appellate jurisdiction of this Court. The collateral effect of the judgment, in so far as the question of penalties accruing under said act is concerned, cannot be considered for the purpose of determining the sum or value in dispute.

Sec. 691, R. S. U. S.

Elgin vs. Marshall, 106 U. S., 578.

New Jersey Zinc Co. vs. Trotter, 108 U. S., 564.

Opelika City vs. Daniel, 109 U. S., 108.

Bruce et al. vs. Manchester & Keene R. R., 117 U. S., 514.

Gibson vs. Shufeldt, 122 U. S., 27.

In the case of Elgin vs. Marshall, *supra*, which is a leading case, the court laid down the doctrine in the following language:

"In our opinion sections 691 and 692, Revised Statutes, which, as amended by section 3 of the act of February 16, 1875, c. 77, limit the jurisdiction of this Court on writs of error and appeal, to review final judgments in civil actions, and final decrees in cases of equity and of admiralty and maritime jurisdiction, to those where the matter in dispute, exclusive of

costs, exceeds the sum or value of $5,000, have reference to the matter which is directly in dispute, in the particular cause in which the judgment or decree sought to be reviewed has been rendered, and do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties." * *

"The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be clearly a violation of the rule to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record." * * * * * * *

"And in every such case it would arise as a jurisdictional question, not how much is the value of the matter finally determined between the parties to suit, but also, whether, and under what circumstances, and to what extent, the judgment will conclude other controversies thereafter to arise between them, and thus require the trial and adjudication of issuable matter, both of law and fact, entirely extraneous to the actual litigation, and altogether in anticipation of further controversies that may never arise. It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject-matter of the judgment. It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision."

Affidavits of the value will not be received where the value is stated in the pleadings or proceedings in the circuit court.

Richmond vs. Milwaukee, 21 How., 391.

Rush vs. Parker, 5 Cranch, 287.

II.

The bill does not state facts sufficient to entitle complainant to the equitable relief prayed for. The complainant has an adequate remedy at law. This Court in the State Railroad Tax Cases, 92 U. S., 612-617, said:

"Let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation of municipalities; that the board of equalization increased the entire assessment on each company without sufficient evidence; in short, let us suppose in these and many other respects the proceedings were faulty and illegal. Does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax, when it is obvious that in justice a large part of it should be paid, and if not paid, that the complainant escapes taxation altogether?"

We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several States, and of the counties, cities and towns, has resulted very naturally in a resort to every possible expedient to evade its force.

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves give the right to an injunction in a court of equity.

Mooers vs. Smedley, 6 Johns Ch., 27.

Dodd vs. Hartford, 26 Conn., 239.

Green vs. Munford, 5 R. I., 478.

Messert vs. Supervisors of Columbia, 50 Barb., 190.

Dow vs. Chicago, 11 Wall., 108.

Hannewinkle vs. Georgetown, 15 Wall., 548.

Tennessee vs. Sneed, 96 U. S., 69.

"That there might be no misunderstanding of the universality of this principle, it was expressly enacted in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.'"

R. S. section 3224.

And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the Government depends for its continued existence. It was a wise policy. It is founded on the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice.

See Cheatham vs. Norvell, decided at this term.

Nickoll vs. United States, 7 Wall., 122.

Dow vs. Chicago, 11 Wall., 108.

"In this latter case, this Court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in the matter, says: 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary process of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant, before the aid of a court of equity can be invoked.' So in the case of Hannewinkle vs. Georgetown, the court says: 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction.'"

15 Wall., 548.

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after the payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to

be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the powers of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative.

Heine vs. The Levee Commissioners, 19 Wall., 660.

A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making or causing to be made a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner.

These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns and cities, we need not here inquire; but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State. High on Injunc., sec. 369, and cases there cited. The assessments in the case before us, of which complaint is made, are all made by the State board of equalization; and though the taxes are collected by the county authorities, a large part of them go to make up the revenue of the State.

In the examination which we have made of these cases, we do not find any of the matters complained of to come

within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged.

There is no violation of the Constitution, either in the statute or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the Constitution violated. If there is an excessive estimate of the value of the franchise or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter; and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose.

But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.

The defendants in all these cases are the clerks and treasurers of the counties—the clerk who makes out the tax list and the treasurer who collects the taxes. These taxes are both the State and county taxes. It is clear, from the statements of the bills and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed.

It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties,

it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing and escape wholly because they have been assessed too high? These questions answer themselves. Before the complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the taxes should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found to be due.

They must first pay what is conceded to be due, and what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the large part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases.

Cooley on Tax., 537.

Palmer vs. Napoleon, 16 Mich., 176.

Hersey vs. Supervisors, 16 Wis., 185.

Roseberry vs. Huff, 27 Ind., 12.

Frazer vs. Liebon, 16 Ohio St., 614.

Parmely et al. vs. The Railroad Companies, 3 Dill., 19."

See also:

Cooley on Taxation, page 772.

97 Mass., 152.

Murray's Lessees vs. Hoboken L. J. Co., 18 Howard, 272 — 282.

III.

The act of the legislature in question imposes a tax upon complainant's intra-state business only. In view of the solemn declaration in complainant's bill "that it does not seek to escape any just burden of taxation, legally imposed upon it, and if it shall be adjudged that said act is a valid law, *or valid to the extent of gross receipts upon the transportation of business done by your orator originating and terminating wholly within the State of Missouri, then your orator is ready and willing, and will promptly pay the sum imposed upon it as required by the terms of said act,*" and in view of the decision of the circuit court, that said act does not impose a tax upon complainant's inter-state business, this Court is doubtless greatly surprised to find complainant in this forum, still insisting that said act *does* impose a tax upon its inter-state business, and asking that the decision of the circuit court, on this point, be reversed. Verily, complainant's actions do not seem to accord with the solemn declaration in the bill, that it is ready and willing, and will promptly pay the tax imposed upon its intra-state business by said act, provided the act is held valid to that extent.

While conceding the authority of the Legislature to impose a tax upon its ~~inter-state~~ intrastate business, appellant now contends that the circuit court, while holding that the statute imposed

a tax upon ~~interstate~~ intrastate business only and was valid, should have enjoined appellees from attempting to enforce its provisions. This proposition is too absurd for serious consideration.

There is not a line nor a word in the act of the Legislature under consideration which justifies the interpretation of the act contended for by appellant. There is no provision in the act imposing a tax upon receipts for transportation "to, from or through this State, or any part thereof." On the contrary, the tax imposed is in terms expressly confined to "receipts for business done within this State," and the context supports this limitation. It is only by distorting the plain provisions of the act and ignoring the usually accepted meaning of words that the act can be construed to apply to receipts from interstate business. None of the decisions of this Court cited by appellant support its contention that the act in question is a regulation of interstate commerce. In each case there was an attempt to enforce the collection of taxes *levied upon receipts from interstate business.* In neither case are the statutes, under which the levies were made similar to the one in question; nor did this Court undertake to interpret either of them.

State vs. Woodruff, etc., 114 Ind., 155, cited by appellant, was confessedly a suit to enforce the payment of taxes upon interstate business. The act under which it was sought to collect the tax, in terms authorized the levy upon such a part of the gross receipts from interstate business as the distance traversed in the State was a part of the whole distance paid for. Appellant has not, it would seem, been able to find a single authority to sustain its contention against the decision of the circuit court on the point under consideration. I quote from the opinion of the circuit court the clear and convincing reasons given for that decision. (Record, p. 18.)

The Court said:

"The disposition of the case on its merits depends on the construction of the statute imposing the tax. The first ques-

tion is, does the tax imposed by the act upon the express company's receipts amount to a regulation of or an interference with interstate commerce? The tax is imposed on the receipts for "all sums earned or charged for the business done within this State." These words qualify the whole act. They are plain and unambiguous.

The words "for the business done within the State" *ex vi termini*, import business begun and ended in the State, and include only intrastate and not interstate commerce. The interjection of the intensifying words "wholly" or "entirely" would not alter their meaning or change their legal effect.

Interstate commerce is not "business done within" the State of Missouri; it is business done between two or more States. A package carried by the plaintiff from Omaha to St. Louis is not business done within the State of Nebraska or the State of Missouri, but is business done between those two States.

A contract for the carriage of goods from one State to another is an entire contract and is an interstate contract, and the carriage of the goods under such a contract is interstate commerce, and is not "business done within" anyone of the States from, through and to which they are carried on such contract.

Before the passage of this act the Supreme Court of the United States had decided in several cases that it was not competent for a State to levy a tax upon earnings derived from interstate commerce.

W. U. Tel. Co. vs. Alabama, 132 U. S., 472.

Leloup vs. Post of Mobile, 127 U. S., 640, and cases there cited.

Rotterman vs. Western Union Tel. Co., 127 U. S., 411.

Lyng vs. State of Michigan, 135 U. S., 161.

The law as contained in these decisions was common knowledge before the passage of this act, and it is obvious that the

General Assembly had these decisions in view in drafting the act. The limitation of the tax to the receipts on business done within the State is explicit and is three times repeated. The legislative intent not to impinge on interstate commerce is manifest.

But if the meaning of the act was doubtful, the doubt must be resolved in favor of its validity. It is a canon of construction that when an act of the Legislature admits of two interpretations, one of which brings it within and the other presses it beyond their constitutional authority, the courts will adopt the former construction.

But if the act could be construed to embrace the earnings derived from interstate commerce, that would not render the whole law invalid; it would still be valid as to the earnings derived from intrastate commerce, and the complainant would have to pay a tax on the receipts of its business done within the State.

Rotterman vs. W. U. Tel. Co., 127 U. S., 411.

W. U. Tel. Co. vs. Alabama, 132 U. S., 472."

IV.

Appellant's fourth point, viz.: that the act of the Legislature, in question, is in violation of the fourteenth amendment to the Constitution of the United States, and of section 3, article 10, of the Constitution of the State of Missouri, is not supported by reason or authority.

In the Kentucky Railroad Cases, 115 U. S., 321, the statute of Kentucky required the president or chief officer of each railroad company or other corporation, in the month of July of each year, to return to the Auditor of Public Accounts of the State the length of its road and its average value per mile, including engines and cars, and a list of depot grounds and improvements and other real estate of the company, and the

value thereof. The Auditor was required to lay the returns before the board of equalization; and if the valuations, or any of them, in the judgment of the board, were too high or too low, they were to correct and equalize the same by a proper increase or decrease thereof. The same rate of taxation for State purposes levied on other real estate was to be levied on the value found by the board of the railroad, rolling stock and real estate of each company. The act provided a penalty for a failure to pay the taxes within the time required, and for suit to collect the taxes.

It was contended that the act, if enforced, in effect took the property of the defendants (the railroad companies) without due process of law, and that it denied to them the equal protection of the laws.

After disposing of the former question, the Court said:

"The plaintiffs in error, however, did interpose a defense below, legitimate in itself, and arising under the Constitution of the United States, namely: That in the proceedings of the board of railroad commissioners, resulting in the valuation and assessment under the act of April 3, 1878, they were severally denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution. As this defense was overruled by the court of appeals of Kentucky, another Federal question is presented, which we are bound now to examine and decide.

The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subject to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as

bridge, mining, street railway, manufacturing, gas and water companies. These latter report to the Auditor the total cash value of their property, and pay into the treasury, as a tax upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers.

But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose. So, the fact that the Legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots, in such a sense as to imperatively require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation. Calling them by the same name does not obliterate the essential differences between them, and accordingly it is not insisted on in argument as an objection to the system, that a railroad running through several counties is valued and taxed as a unit and by a special board organized for that purpose, while other real estate is valued in each county by assessors.

The final point of objection seems to be reduced to this. In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors who may change the valuation, but not so as to increase it, without notice to the tax-payer, and opportunity for a formal rehearing upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge; and, again, if the amount of the tax is equal to fifty dollars, to the circuit court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased. The discrimination, however, is apparent rather than real. An examination of the statutes shows that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the tax-payer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has authority to increase the original assessment made by the railroad commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate.

But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require in any case an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of Missouri vs. Lewis, 101 U. S., 22, 30. It was there said by Justice Bradley, delivering the opinion of the court and speaking to this point, that "the last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to the subject-matter, amount,

or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. The right to classify railroad property as a separate class, for purposes of taxation, grows out of the inherent nature of the property and the discretion vested by the Constitution of the State in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws."

In the case of the State Board of Assessors vs. Central R. R. Co., 4 Cent., 426, there was an act providing that all the property of any railroad or canal company not used for railroad or canal purposes should be assessed and taxed by the same assessors and in the same manner and at the same rate as the taxable property of other owners, and that their property used for railroad or canal purposes should be assessed by a board of assessors at a certain per cent for State and at a certain per cent for local purposes.

As against the objection that the property was not assessed according to its true value and by a uniform rule, the court, on page 430, says: "The property, separated, so far from being taken by mere arbitrary selection, is all of it so circumstanced by reason of the peculiar use to which it is put as to make it on that account a class by itself. To value and tax such property in the same way in which other property is valued would be unjust." And on page 431: "This peculiarity of the property in question constitutes it a legitimate class for the purposes of taxation—a class which, in order to deal with it fairly in the matter of taxation, must be treated separately."

And again, in the same case, page 431: "Railroad and canal property, which cannot in justice to the owner be valued in the same way as other property of a like nature, the Legislature was bound to provide a proper method of valuing it justly for the purposes of taxation. Such method must be a peculiar one.

"The machinery provided for the purpose by the act—a State Board of Assessors—is appropriate and such as is necessary in view of the peculiar character of the property. If, by the method adopted, the companies are required to bear no more than their just share of the public burden of taxation, they surely have no ground of complaint. Whether the tax which they pay is appropriated to State purposes alone, or to State and county and municipal purposes, is a matter which does not concern them."

In the case of State ex rel. vs. Severance, 55 Mo., 387, the court says:

"The act providing for a board of equalization for the purpose of assessing railroads and their property does not violate the provision of the Constitution which declares that taxation on property shall be uniform. The board of equalization assess all of the property at its cash value, and then it is taxed in the same manner as all other property of a like description. The principle of uniformity is adopted throughout. Its validity is in nowise impaired or affected because a different mode of assessment is provided for, so long as the same end is attained. It is not an absolute or indispensable requisite that the county or corporation assessor should make the assessment. That duty may be devolved on any officer or officers if uniformity is accomplished and preserved."

A reference to section 18 of article 10 of the State Constitution, and sections 7512–7521, in regard to the powers and duties of the State and county boards of equalization, and an examination of the authorities cited in this brief, establishes beyond question that said boards have no authority, and were

never intended to have any, with respect to equalization of the valuation on any other than *real and personal property:* that is, *tangible property.* As to property of that class or character belonging to express companies, it is, under the general revenue law, equalized the same as property of the same kind belonging to other persons or corporations.

Under section 3 of article 10 of the Constitution of Missouri, the Legislature has power to classify the subjects of taxation. The tax imposed under this act is "uniform upon the same class of subjects within the territorial limits of the authority levying the tax," and is not in violation of that section.

This section was taken from the Constitution of Pennsylvania, article 9, section 1. The Supreme Court of that State, in the case of The Germania Life Insurance Co. vs. Commonwealth, 85 Pa. St., 513, where a similar point was raised, a different tax having been imposed by the Legislature on foreign insurance companies from what was imposed on home insurance companies, held that "the Legislature has power to classify the subjects of taxation, and that foreign insurance companies may be placed in a class by themselves, and distinct from domestic insurance companies, and may be taxed independently and differently."

In Central Railroad Co. of New Jersey vs. State Board of Assessors, 5 Cent. Rep. 659, the court says: "It seems to me indubitable that it has been established in this State, that property of any kind can be grouped for taxation arbitrarily by the Legislature."

The Supreme Court of Alabama, in the case of Western Union Telegraph Co. vs. State Board of Assessment, 80 Ala., 280, says:

"The taxing power may select the subjects of taxation and constitutionally classify them. * * * The rule of uniformity does not require that all subjects be taxed, nor taxed

alike. The requirement is complied with when the tax is levied equally and uniformly on all subjects of the same class and kind. Different occupations may be taxed at different rates, and some may be altogether exempted; and the requirement of uniformity is not infringed if the various classifications include all occupations similarly circumstanced and of the same kind."

The St. Louis Court of Appeals, in the case of the city of St. Louis vs. Spiegel, 16 M. A., 210, says:

"We do not consider that the sale of meat in market-houses and the sale of meat in meat-houses are 'the same class of subjects' within the meaning of the constitutional inhibition, article 10, section 3."

And in the same case, citing City vs. Weber, 44 Mo. 547, they say:

"The Supreme Court (in that case) held an ordinance just and reasonable which prohibited meat-shop men, as distinguished from lessees of market-stalls, from selling fresh meat in less quantities than a quarter, and from selling meat at all in the new limits. This would hardly have been done had the meat-shop men and market men been of the same class. They are *ejusdem generis,* in that they are both retailers, and retailers of meat; but the selling of meat in meat-shops and the selling of it in a common market-house are evidently different classes of subjects, exposed to different regulations."

The law relating to peddlers' licenses, in which the cost of the licenses is not affected at all by the value of the goods peddled, but by the mode in which the business is conducted—the peddlers who travel by foot not being required to pay as much for a license as those who use horses or mules, or conveyances by land or water—was sustained by the Supreme Court in the case of State vs. Welton, 55 Mo. 288.

This would hardly have been done had not the court recognized the right of the Legislature to thus divide peddlers into classes for the purposes of taxation. This case was overruled (95 U. S., 275), but not as to the point herein presented.

The Illinois Supreme Court, in the case of the Home Insurance company vs. Swigert, 104 Ill., 653, says:

"Foreign insurance companies are not necessarily for all purposes of the same class for the purposes of assessment and taxation. There may well be one or more attributes or characteristic marks common to several classes, and yet each class for some purposes be quite distinct from the other. The framers of the Constitution having failed to classify insurance companies for these purposes, the power to do so rests exclusively with the Legislature."

A statute of Louisiana imposed a tax of one thousand dollars on each foreign insurance company and a tax of five hundred dollars upon each domestic insurance company doing business in the State. State of Louisiana vs. Lathrop (10 La. Ann., 398), was a suit to compel a foreign insurance company to pay the tax authorized by this statute. The suit was resisted on the ground that the act was a violation of the State Constitution, which declared that taxation should be equal and uniform throughout the State. The Supreme Court of Louisiana, in passing upon the question, said:

"The provision of the constitution relied upon by defendant has not deprived the Legislature of the power of dividing the objects of taxation into classes; it merely obliges the Legislature to impose an equal burden upon all those who find themselves in the same classes."

An ordinance of the city of New Orleans imposes a license of two hundred and fifty dollars for pursuing the occupation of junk dealer, while the license tax imposed upon ordinary dealers in merchandise was much less. The city in suit against junk dealers to enforce the payment of this tax, the defendant relied upon the constitutional provisions above referred to. The Supreme Court of the State in passing upon the question, said:

"The constitutional requirement that taxes shall be uniform throughout the State (Art. 188) does not inhibit the

Legislature from nor deprive it of the power to divide the objects of taxation into classes; but it does command the law making department of the government to impose the same burden upon all who are in the same classes."

City of New Orleans vs. Kaufman et al., 29 La. Ann., 283.

To the same effect are:

Youngblood vs. Sexton, 32 Mich., 414.

Central R. R. Co. of New Jersey vs. State Board of Assessors, 5 Cent. Rep., 659.

Separate opinions of the judges in the case of State Board of Assessors vs. Central R. R. Co., 4 Cent. Rep., 426.

State vs. Powell, 100 N. C., 525.

City of St. Louis vs. Sternberk, 69 Mo., 301.

State of Louisiana vs. Lathrop, 10 La. An., 396.

Wintz vs. Girardey et al., 31 La. An., 381.

Cutliff vs. Mayor, 60 Ga., 597.

Goodwin et al. vs. Mayor, 53 Ga., 410.

Hughes vs. Cairo, 92 Ill., 339.

Walker vs. City of Springfield, 94 Ill., 364.

State Railroad Tax Cases, 92 U. S., 575.

And in Railroad Co. vs. Mackey, 127 U. S., 205; Railroad Co. vs. Humes, 115 U. S., 512; Dent vs. Virginia, 129 U. S., 114; Insurance Co. vs. New York, 134 U. S., 594, and Connecticut Railroad Cases, 115 U. S., 321 (cited in appellant's brief), the right of the Legislature to classify the different objects and subjects of taxation is upheld where all such subjects or objects "are treated alike under similar circumstances and conditions."

The Legislature, as will be seen from the above authorities, has the unquestioned right to classify the subjects of taxation, and this it has done in respect to express companies doing business in this State. Having done this, there is nothing which forbids the valuation of it by a different method from other classes not similarly circumstanced. "*The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.*"

The tax is "uniform upon the same class of subjects." Section 1 of the act defines express companies, and section 2 imposes the same tax and provides the same methods for collecting it on all express companies. Section 3, article 10 of our Constitution was taken from the Constitution of Pennsylvania. The Supreme Court of that State holds that under it the Legislature has power to classify the subjects of taxation. The courts of other States have gone so far as to allow the separation of persons and corporations belonging to one general class into distinct classes for the purpose of taxation, as the separation of insurance companies into different classes. But here there is nothing of that kind attempted. All express companies are placed in one class and taxed alike. In fact, there are no other persons or corporations similarly circumstanced and doing business according to the methods adopted by them; hence there can be no discrimination.

This feature of the case is so fully and forcibly discussed by the learned judge who delivered the opinion in the court below, that I quote at length that portion of the opinion bearing on the subject. (Record pp. 19, 20–1–2–3 4.)

He said:

"The next contention is that the act deprives the plaintiff of the equal protection of the laws secured to it by the fourteenth amendment to the Constitution of the United States, and violates the rule of uniformity and equality of taxation

required by that article and the Constitution of the State of Missouri.

This contention is rested on the words of the act that limits its operation to express companies that carry "by express on contract with any railroad or steamboat company."

Neither the Constitution of the United States nor of the State of Missouri requires taxes to be levied by a uniform rule upon all descriptions of property, or that all taxes on franchises, licenses and privileges should be equal or imposed by a uniform rule. For purposes of taxation, property and franchises, licenses and privileges, may be classified and the different classes valued or taxed by different methods.

The pursuits of mankind have become so varied, and property has assumed so many forms, many of them artificial and complicated, that different classifications of property for purposes of taxation and the valuation of different classes by different methods are rendered imperatively necessary; and franchises, licenses and privileges may be classified according to their several natures and each class taxed a different rate and by a different method, or some may be taxed and others not.

There is no evasion of the requirement of equality or uniformity so long as all in the same class are subject to the same tax under the same conditions. These principles have been repeatedly affirmed by the Supreme Court of the United States. In the latest utterances of that Court on this subject it is said:

"The provision in the fourteenth amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it

may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them." * * * "We think that we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation."

Bell's Gap Railroad Company vs. Pennsylvania, 134 U. S., 232, p. 237.

"But the amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind of property to a different rate, distinguishing between franchises, licenses and privileges and visible and tangible property and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates or the objects sought to be obtained by it; and when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See

Barbier vs. Connolly, 113 U. S., 29–32.

Soon Hing vs. Crowley, 113 U. S., 703–709.

Missouri Pacific Railway vs. Humes, 115 U. S., 512–523.

Missouri Pacific Railway vs. Mackey, 127 U. S., 205, 209.

Minneapolis Railway Co. vs. Beckwith, 129 U. S., 26, 32."

Home Insurance Co. vs. New York State, 134 U. S., 594, p. 606, 607.

In the light of the doctrine of these cases, it is plain the act we are considering is not in contravention of the fourteenth amendment.

The act imposes the same tax on all express companies in the same circumstances and conditions.

It is not averred in the bill and was not contended in argument that any person, company or corporation engaged exclusively in the express business owns and operates its own railroads and steamboats for the exclusive purpose of carrying its express messengers and freights. There are no such express companies.

In the matter of the express companies, Interstate Commerce Commission report 349, page 367, the question was presented to the commission whether express companies were within the provisions of the interstate commerce act.

In enumerating the reasons set up by the express companies against the claim that they were within the act, the commission say:

"The words 'its railroad,' the express companies say, exclude the idea that they are intended by the law, for they have no railroads; they neither own nor operate any railroad lines;" and the commission concurred in this view.

The act of the Legislature of Missouri applies to express companies proper, and contains a brief, and as far as it goes, accurate definition of them. From the origin of express companies down to the present time a distinguishing and uniform feature of their method of conducting business has been the hiring of railroad and water transportation for their messengers and freights. It is a common carrier that does not own any means of transportation, but hires other common carriers —railroad and steamboat companies—to carry its freight and messengers.

It may be defined to be a common carrier that carries at regular and stated times over fixed and regular routes money and other valuable packages which cannot be conveniently or safely carried as common freight, and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge and custody of its own messenger, on passenger steamers and express and passenger railway trains which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights, and within cities and towns or other defined limits it collects from the consignors and delivers to the consignees at their places of business the goods that it carries.

Express Cases, 117 U. S., 1.

Retzer vs. Wood, 109 U. S., 185.

1 Interstate Com. Rep., p. 273.

In the matter of Express Companies, 1 Interstate commerce R., 349.

The Court is bound to take judicial notice of a matter of public history and facts notorious to persons of ordinary intelligence. It would be discrediting to the Court to affect to believe that there was any person in Missouri conducting an express business without the use of railroad or steamboat transportation. The freighting business of this country was once carried on in wagons propelled by animal power, on dirt roads; but that method of transporting common freights has been rendered obsolete by the railroads and steamboats. Such a thing as an express company disassociated from transportation by rail or steamer is unknown.

In the case of Hoey, suing as a shareholder in the Adams Express company against these same defendants, submmitted for decision with this case and depending on the same ques-

tions, the bill alleges that the Adams Express company, in conducting its business, "utilizes over nineteen thousand miles of interstate railway communication."

It is true there are in cities and towns persons and corporations that carry goods and parcels in wagons or carts from one place in a city or town and its vicinity to another as chance may offer, but that is not an express business. A statute of the United States provided "that any person, firm, company or corporation carrying on or doing an express business shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business."

Under this statute the collector of internal revenue required one Ritzer to pay a tax for carrying on an "express business." Ritzer's business was the carrying of goods, freights and baggage in wagons between New York and Brooklyn, and from one place in Brooklyn to another place in the same city.

He did not run regular trips nor over regular routes, but when and where he had orders. Upon these facts the Supreme Court of the United States held that Ritzer was not carrying on an "express business."

The Court said: "We are of the opinion that the plaintiff was not liable to this tax, because he did not carry on or do an 'express business' within the meaning of the statute. Although he carried goods between New York and Brooklyn, and from one place to another in either city, he did so solely on call and at special request. He did not run regular trips or over regular routes or ferries. He was no more than a drayman or truckman doing a job when ordered. The fact that he had a place in Brooklyn where orders could be left on a slate made no difference. The words 'express business' in the statute must have the meaning given them in the common acceptation. An 'express business' involves the idea of regularity as to route or time or both; such is the definition in the lexicons."

Ritzer vs. Wood, 109 U. S., 185, p. 187.

But suppose a business like Ritzer's could be called an express business; it differs so essentially in methods and conditions from the business defined by the act we are considering that it is obvious that they may be differently classed for taxation, and that the rule of equality and uniformity would not be violated by varying either the rate or the method of taxing them.

The Legislature might well consider a tax on the teams and wagons sufficient in the one case and a tax on the earnings necessary in the other, or it might exempt the one and tax the other without impinging on the fourteenth amendment.

See Gibson Co. vs. Pullman South. Car Co., 42 Fed. Rep., 572, p. 574.

The express business taxed by this act differs so materially from that conducted by other common carriers and is so clearly defined and understood to be a distinct and separate branch of business, that it was eminently proper, if not imperatively necessary, if it was to be taxed at all, for the Legislature to class it by itself, and, having so classed it, it was competent for the Legislature to impose such a tax on its earnings for business done within the State as its wisdom dictated, not in excess of any limit prescribed by the Constitution of the State.

In the first annual report of the Interstate Commerce Commission, 1887, p. 13, it is said:

"Some of the railroad companies, however, have undertaken to do the express business on their own lines through their own agencies. The Baltimore & Ohio Railroad company did this for a time, and then sold the business to one of the existing express companies. Some of the western railroads combine for the purpose, and for convenience create a nominal corporation to do the business over their several lines, and divide the net proceeds. * * * There is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation."

When a railroad company, by the addition of a new bureau or department and the adoption of new methods in the conduct of its business, qualifies itself to do the business commonly done by an express company, it does not thereby itself become an express company. Such an expansion or extension of its business as a common carrier works no change in its corporate character, nor does it escape taxation on such new business. All schemes for the taxation of railroads, however much they may vary in details, are intended to include and do include in one way or another a tax on all their property, income and franchises. If the tax is not in terms laid upon their business and income, due regard to these is had in imposing the tax on their property and franchises.

It may be conceded that there are no means of ascertaining whether a railroad company pays more or less tax on the earnings derived from its express business than is paid by an express company; but if it is admitted to be less, that is not the want of equality that falls under the ban of the constitution, but it results from the difference in the constitution, methods and business pursuits of the two corporations, which justifies the Legislature in classifying them differently for purposes of taxation and taxing them by different methods.

What is true of one railroad company is true of any association of railroad companies. All business they do as railroad companies is taxed in the general scheme for the taxation of railroads.

It is not alleged in the bill in this case that the persons and corporations which it is averred are carrying goods "by freight and express" are not taxed. The complaint is that they are taxed at a different rate and by a different method from that applied to the plaintiff and all others who carry freight "by express on contract with any railroad or steamboat company."

The plaintiff's contention is that those carriers who own their transportation and are common carriers of all manner of freights shall be taxed at the same rate and by the same method as those carriers who hire their transportation and whose business is limited to the carriage of express matter; in a word, that for purposes of taxation railroad companies shall be classed with express companies and taxed at the same rate and by the same rule.

There are inherent and fundamental differences in the corporate franchises, rights and duties, property and methods of business of a railroad company and an express company. These differences forbid their being classed together for purposes of taxation. Such a classification would be extremely incongruous. Because of this difference between the railroad companies and the express companies, the latter could not be brought within the purview of the interstate commerce act.

Case of the Express Companies, 1 Inter. St. Com. Rep., 349.
United States vs. Morsman, 42 Fed. Rep., 448.

Except as to their visible and tangible property, there seems to have been no law for taxing express companies until the passage of this act, for the Legislature, in the third section of the act, assigns as a reason for putting the act in force from its passage the fact of "there being no law in this State by which such companies are taxed."

Will any one seriously contend that before the passage of this act railroad companies could have successfully resisted the payment of taxes because express companies were not taxed, or that they can now do so because the method of taxation is different?

If the rule contended for by the plaintiff is sound, it must be reciprocal, and if express companies are not liable for the tax because they are not classified for taxation with railroad companies and taxed in the same manner, then the railroad

companies can object to paying taxes because they are not classified with express companies and taxed by the same method. For purposes of taxation they have no relation to each other, and the method of taxing them may be as widely different as the Legislature in its wisdom chooses to make it."

In conclusion, I beg to remind the Court of two of the well-settled rules that apply in determining the constitutionality of a statute, and which are as follows:

1. "Courts will not declare a statute unconstitutional unless it is manifestly so, and all fair and reasonable doubts on this point will be resolved in favor of its constitutionality;" or as otherwise stated by the Supreme Courts of Missouri and Pennsylvania, (77 Mo. 118, and 26 Pa. St. 287): "In all cases, the Courts presume that acts of the Legislature are constitutional, and the burden is upon him who alleges the contrary to prove it beyond a doubt."

2. "When an act of the Legislature admits of two interpretations, one of which brings it within and the other presses it beyond their constitutional authority, the Courts will adopt the former construction."

Respectfully submitted.

JOHN M. WOOD, ATTORNEY-GENERAL,
For Appellees.